TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 104

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

vs.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

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INDEX

	Original	Print
Record from the district court of the United States, Western Missouri	a	1
Citation with acknowledgment of service (omitted in printing)	b	
Caption (omitted in printing)	1	
Bill of complaint	2	1
Temporary restraining order	27	37
Bond on restraining order (omitted in printing)	31	
Order continuing restraining order	33	41
Application to disqualify Judge Merrill E. Otis	35	42
Order certifying disqualification to senior circuit judge.	36	43
Order designating Hon. Albert L. Reeves	37	43
Amendment to bill of complaint	39	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1929

	Orig	Print
Amendment to bill of complaint	41	46
Application for interlocutory injunction	43	46
Motion to dismiss or stay unless restitution be made	46	49
Motion to dismiss or stay unless bond be given	49	51
Motion to dismiss	54	55
Stipulation to transfer to western division	57	57
Order transferring to western division	58	57
Order substituting parties defendant	59	58
Order denying application for injunction	61	58
Petition for appeal	63	59
Assignment of errors	65	60
Order allowing appeal	70	63
Bond on appeal (omitted in printing)	71	
Appellant's præcipe for record	74	64
Statement of evidence	78	66
Plaintiff's Exhibit 1—Affidavit of Charles R. Street.	79	66
Plaintiff's Exhibit 2—Affidavit of F. P. Hamilton	93	76
Plaintiff's Exhibit 3—Affidavit of Paul W. Terry	102	83
Plaintiff's Exhibit 4—Affidavit of Paul W. Terry	110	91
Offer in evidence	111	92
Defendants' Exhibit "A"—Order of supreme court of Missouri, Ætna Insurance Co. vs. Hyde	112	93
Offer in evidence	112	93
Testimony of William S. Hogsett	112	94
Plaintiff's Exhibit 5—Mandate of U. S. Supreme Court, Ætna Insurance Co. vs. Hyde	113	94
Testimony of Guy M. Sone	115	95
Exhibit—Mandate of supreme court of Missouri, Ætna Insurance Co. vs. Hyde	115	96
Order approving statement of evidence	117	97
Opinion, Stone, J	118	98
Clerk's certificate (omitting in printing)	138	
Statement of points to be relied upon and designation as to printing	139	130

[fols. a & b-d] In Equity. No. 988

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Plaintiff,

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants

Citation, in usual form, showing service on Floyd E. Jacobs and John T. Barker, filed April 29, 1929, omitted in printing.

[fol. 1] [Caption omitted]

[fol. 2] **IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION**

BILL OF COMPLAINT—Filed Feb. 14, 1928

Now comes the above named plaintiff, National Fire Insurance Company of Hartford, and for cause of action against defendant, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and North Todd Gentry, Attorney General of the State of Missouri, states:

First

Plaintiff is now and at all times herein mentioned was a corporation of a state other than the State of Missouri and organized and existing under the laws of the State of Connecticut as a stock fire insurance company, authorized by its charter to do a business of fire, lightning, hail, windstorm and allied lines of insurance usually done by fire insurers, and it, the plaintiff, is a citizen and resident of the said last named state. Defendant, Ben C. Hyde, is now and at all said times was a citizen and resident of Jefferson City, Cole County, Missouri, and of the Central Division of the Western District of Missouri, and said defendant is and was at all said times the duly appointed, qualified and

acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, North Todd Gentry, is Attorney General of the State of Missouri, and as such Attorney General is the chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law, and generally to enforce the law on behalf of said commonwealth; said North Todd Gentry is a resident of the State of Missouri and of the Central Division of the Western District thereof and a citizen of the State of Missouri.

[fol. 3] Second

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of $5,000 and exceeds, exclusive of interest and costs, the sum or value of three thousand (3000) dollars and

(1) arises under the Constitution of the United States; namely, the orders of the Superintendent (hereinafter specifically set forth) are asserted to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that sections 6283 of the Revised Statutes of the State of Missouri, 1919 and said section as amended, by virtue of which the authority of the defendant, Ben C. Hyde, to make his said orders, and section 6287 of said statutes, under which the defendant, North Todd Gentry, threatens to proceed and will proceed if not enjoined, are void and violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that they (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty without due process of law;

(3) is between citizens of different states, namely, the defendants are citizens of the state of Missouri, and the plaintiff is a citizen of the State of Connecticut.

Third

The facts are as follows:

Par. 1. Plaintiff is now and at all times herein mentioned was a stock fire insurance company engaged in the business of fire, lightning, hail and windstorm insurance, and authorized and licensed to do, and doing, said business in the state of Missouri.

In order to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did establish long before October 9, 1922, local agencies in the various cities and towns throughout the state, at large cost and expense, and the agencies so established are of great value. Without such agencies so established, it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely of the value of $5,000.

Plaintiff has at great cost and expense made elaborate surveys and from such surveys has compiled elaborate maps, which are supplied to its agents and by them used in the writing of insurance in the State of Missouri. Said maps and surveys are of a reasonable value in excess of the sum of One Thousand Dollars.

In accordance with the requirements of Section 6270, R. S. 1919, and long before October 9, 1922, the plaintiff has compiled and does now maintain in the State of Missouri a public rating record, through medium of Missouri Inspection Bureau including extensive maps, surveys and other data, comprehending the result of inspection of many thou- [fol. 4] sands of parcels of insurable property in said state, from which the rate of premium applicable to each risk in this state may be ascertained in advance of the making of insurance thereon; such rating record includes general basis schedule, embodying basis rates, charges, terms, conditions, permits and standards, and such other data as are necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the

forms and endorsements upon which each rate is predicated, and show the changes of rate to be made on account of each and every change of form or endorsement. Such rating record of plaintiff is of the value of more than $3,000.

Par. 2. On October 9, 1922, and since 1915, the date of its enactment, there was in force a certain public law of the state of Missouri, known as Section 6283, R. S. Mo. 1919, in words and figures following:

"Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions.—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the superintendent of insurance shall be applied, subject to his approval: Provided, that the superintendent of insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state."

By Section 6284 of said statute it was provided that review of the orders and directions of the superintendent of insurance might be had by proper action in the courts.

Par. 3. On the 9th day of October, 1922, said defendant Hyde, purporting to act under such statute did promulgate an order in writing, which he served on this plaintiff and all other stock fire insurance companies doing business in Missouri, by serving the same upon Missouri Inspection Bureau, the rate-making organization to which plaintiff and

all other stock fire insurance companies in Missouri belonged. By said order he did direct as follows:

"You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the state.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the superintendent will designate the class or classes to which the reduction shall apply."

[fol. 5] Par. 4. Thereafter, on November 10, 1922, purporting to act under Section 6284, R. S. Mo. 1919, 157 stock fire insurance companies, comprising all of said companies doing business in Missouri, and including this plaintiff, filed a joint review proceeding to review such rate reduction order, which case was considered on appeal by the Supreme Court of Missouri, which did sustain said order as against said review proceedings so jointly brought, and did justify said order of the superintendent as follows:

(a) That the standard of measurement of aggregate profit of all stock fire insurance companies in the state of Missouri during the five-year test period, covering calendar years 1917 to 1921 inclusive, whereby to limit their aggregate collections and restrict their aggregate earnings for the future should be based upon adoption of the amount of premiums received as income, and losses and expenses paid as outgo, thereby taking into account, as income, unearned premiums covering prepayment for liability of the future extending beyond said test period, and rejecting as outgo losses and expenses incurred, but not yet paid, although liability for same be firmly fixed during said test period. The experience of all stock fire insurance companies in the aggregate in Missouri for the years 1917 to

1921 inclusive, taking into account the premiums received as income, and losses and expenses paid as outgo, was as follows:

Premiums received	$83,502,181
Losses and expenses paid	80,161,057
Excess of premiums received over losses and expenses paid	$3,341,124

In the same years, the premiums earned and losses and expenses incurred were as follows:

Premiums earned	$74,813,816
Losses and expenses incurred	81,824,016
Excess of losses and expenses incurred over premiums earned	$7,010,200

(b) By taking into account as income, to ascertain aggregate experience of all companies during said five-year period, all interest derived by them from the investment of unearned premiums, said sum for the five years being found by the superintendent to be in the amount of $2,301,132.

(c) By rejecting from expense certain commissions actually paid by the stock fire insurance companies to their agents for securing business, upon the ground that the portion of said commissions so rejected upon business written in St. Louis, Missouri, was upon a commission rate higher than was paid to agents of said insurance companies in the remainder of the state, which said excess so rejected from expense was in the sum of $2,496,715.

(d) By rejecting from expense of said stock fire insurance companies, in ascertaining their aggregate experience for such test term, the item of federal war tax on Missouri premiums in fact incurred and paid by said stock fire insurance companies during the test term, the amount so rejected from expense being in the sum of $628,123.

Par. 5. After entry of the final judgment in the Supreme Court of Missouri, as aforesaid, in the year 1927, the stock fire insurance companies, petitioners in said review proceeding, inclusive of this plaintiff, jointly applied to the

Supreme Court of the United States for a writ of certiorari [fol. 6] to review said judgment of the Supreme Court of Missouri, which writ was issued but thereafter was dismissed for want of jurisdiction.

Par. 6. In the said review proceeding aforesaid, in the court of original jurisdiction, which was the Circuit Court of Cole County, Missouri, the plaintiff, together with all the said other stock fire insurance companies doing business in Missouri, 157 in number, did, upon the order and requirement of the Court in said cause, execute a bond with Fidelity & Deposit Company of Maryland as surety, in the penal sum of $500,000, to respond under the terms of said bond to the said defendant Hyde, for the use and benefit of all persons, firms and corporations to whom policies of fire, lightning, hail and windstorm insurance, covering property in the state of Missouri, may be issued by the plaintiff and the said other stock insurers on and after November 10, 1922 and prior to the entry of a final decree in said cause; and thereafter, in August, 1923, the said Court enacted a further bond in the additional sum of $500,000 from the plaintiff and said other stock fire insurance companies, which was then executed pursuant to the requirement of the Court, said bond being substantially upon the same conditions as said other bond. The surety upon said bond so last recited and described was Hartford Accident & Indemnity Company.

Par. 7. Prior to the making of said rate order of November 9, 1922, and since, plaintiff and 156 other stock companies doing business in Missouri did, each and all, write policies of insurance upon uniform rate charges, upon hazards in said state, the level of rates being fixed by basis rates and creation of relativity in rates throughout the state through the medium of Missouri Inspection Bureau, which made filings thereof for each stock company doing business in the state of Missouri, including the plaintiff. The effect of said filings was to place the charge for insurance by stock companies in Missouri upon a uniform level of rates, which method and manner of making and creating rates was sanctioned and directed by the statutes of Missouri. In addition to basis rates and schedules, specific rates or local tariffs were also made and published

respecting a great number of parcels of insurable property in the state, which property was inspected, valued, and rates published upon the same, which said publications were uniform as to all stock companies in the state, including the plaintiff, and likewise published and validated by law as aforesaid.

The level of rates existing at the time of the making of the order of said defendant Hyde aforesaid, as the same existed immediately before the making of his said rate order, has not been departed from but has been maintained and continued to the present time by the plaintiff and the various other stock fire insurance companies doing business in the state of Missouri.

Par. 8. Said defendant Hyde on February 1, 1928, did make designation of the class or classes of insurance to which the said reduction order aforesaid shall be applied by plaintiff and other stock insurance companies, namely upon all classifications of fire, lightning, hail and windstorm risks, and the said defendants Hyde and Gentry unless restrained and enjoined by this court will assert the validity of the said rate reduction order and the power of the defendant Hyde to make the said order pursuant to the said statute aforesaid, and will bring or cause to be brought many hundreds of suits on the part of or for the benefit of policyholders, and assert claims of hundreds of policyholders against the plaintiff who had policies of insurance, [fol. 7] and will sue the plaintiff upon said bonds aforesaid, and sue the said surties executing said bonds aforesaid to enforce the penalty of said bonds.

Par. 9. If the said rate order were to be placed in effect and the same applied to and enforced against plaintiff, and plaintiff be required to put such reductions in force, and plaintiff be required to write insurance at such reduced level it would reduce plaintiff's total income from its business of insurance in Missouri to the extent of about 10% and reduce rates of premium to be charged by this plaintiff in Missouri to a level so low as to be wholly inadequate to meet losses and reasonable expenses or to give any compensation to the plaintiff for the risks to be assumed by plaintiff under its policies of insurance, and would be such as to cause this plaintiff to do insurance business, in Mis-

souri without a reasonable profit, or any profit, and at a loss. Thereby, this plaintiff would be forced either to do such business at an actual loss, or alternatively to withdraw from doing such business in Missouri, and thereby the value of all of its many agency contracts, and of its agency plants, good-will, established business, maps, surveys and rating records, which it has established in Missouri at great cost and expense and which are of value only if it continues doing business in Missouri, and which are reasonably worth more than $5,000, will be entirely destroyed. In either alternative, plaintiff will be deprived of its property without due process of law by said rate reduction order, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of Constitution of Missouri.

Par. 10. By the term "written premiums," as herein employed, is meant all the premiums for a specified period received by insurance companies, including earned and unearned premiums. By "expenses and losses paid" is meant those losses and expenses paid during the period, not taking into account losses and expenses incurred for which liability exists but which have not in fact been paid during such period. By "earned premiums" is meant the prepaying for insurance in force during the specified period, whether written before or during such period. By "incurred losses and expenses" is meant expenses and losses for which liability becomes firmly fixed during the period, whether paid or unpaid.

A method of profit or loss accounting by taking earned premiums as an element of income and incurred losses and expenses as elements of outgo is sound and that treating written premiums as an element of income and paid losses and expenses as an element of outgo is an unsound method of accountancy, the balance upon which in no way discloses profit or loss.

The plaintiff, upon the measure of its individual experience, taking into account earned premium as an element of income and incurred loss and expense as elements of outgo during the five-year period before the date of the rate order and during the period since that time plaintiff has, during each such period, lost money and made no money whatso-

ever upon the conduct of its business of insurance in the state of Missouri.

To reduce the rates of premium upon its business so by it conducted at a loss and thereby increasing the loss which it will sustain thereon may not be justified by taking a balance at between written premiums and paid losses and expenses as applied to the aggregate experience of all companies in the state for five-year test period and upon striking a favorable balance by employment of such method to thereby justify a further and additional reduction of income of the plaintiff for the future.

[fol. 8] If said reduction order should be applied to business conducted by plaintiff, it would reduce the rates of premium to be charged by plaintiff in Missouri to so low a level as to take away all allowance for the conflagration hazard and all profit, and compel plaintiff, if it continues doing business, to do so at a loss, and no compensation whatever whereby it will be deprived of its property without due process of law in violation of said Section 1 of the Fourteenth Amendment, and Section 30 of Article II of Constitution of Missouri.

Par. 11. Said rate reduction order as justified by the Supreme Court of Missouri purports to justify said reduction in rates on the ground that in the years 1917 to 1921 inclusive, the aggregate profit of all companies upon their Missouri business was in excess of what is reasonable and the individual experience of plaintiff was in nowise considered, nor contemplated by said statute. The order, if applied to this plaintiff, would compel this plaintiff to reduce its rates, not on the ground that this plaintiff has made or its making an unreasonable profit or any profit, but on the ground that other insurance companies have derived an unreasonable profit. In truth and in fact this plaintiff did not within said years derive, or in the years 1922 to 1926 inclusive derive, and it is not now deriving an unreasonable profit from its insurance business in Missouri, but it has during said period 1917 to 1921 and period since 1921 operated and it now operates its business of insurance at a loss in Missouri although it has at all times conducted its business prudently, economically and soundly. The total income and outgo of this plaintiff on its business of insurance in Missouri during the years 1917 to 1921 inclusive were as follows:

Income (earned premium)	$2,024,766
Outgo (incurred losses and expenses)	2,330,251
Loss	$305,485

The total income and outgo of this plaintiff on its business in Missouri during the years 1922 to 1926 were as follows:

Income (earned premiums)	$2,768,502
Outgo (incurred losses and expenses)	2,793,407
Loss	$24,905

Upon its business of insurance in Missouri for the year 1927 the plaintiff's experience was even more unprofitable than in the preceding ten years.

Defendant's said reduction order, in directing plaintiff to reduce its rates, when it has lost and is losing money on its business in Missouri, on the ground that other companies have made or are making an unreasonable profit, and that plaintiff has income from sources other than its business of insurance in Missouri, confiscates and takes this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of Constitution of Missouri.

Par. 12. Section 6283, R. S. Mo. 1919, is the sole and only statute purporting to authorize defendant to make said rate reduction order. Said statute is unreasonable, confiscatory, unconstitutional and void, as against this plaintiff, for these reasons:

[fol. 9] (a) Said statute purports to authorize defendant to order a reduction of rates to be charged by this plaintiff in Missouri, regardless of whether this plaintiff's experience in Missouri has shown or is showing a profit or a loss, but solely in the event that the result of the earnings in Missouri of all stock fire insurance companies for five years next preceding defendant's investigation shows that there has been an aggregate profit of all companies in Missouri in excess of what is reasonable; and so the power to reduce this plaintiff's rates is made dependent, not upon this plaintiff's experience, but upon the experience of other com-

panies, competitors of plaintiff, in which plaintiff has no interest and over which plaintiff has no control. In so providing, said statute confiscates and deprives this plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 30 of Article II of the Constitution of the State of Missouri.

(b) The business of fire insurance is purely and exclusively a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies. The amount of indemnity and the premium is a matter of private negotiation and agreement.

The business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, and cannot be compelled.

The business of plaintiff is not a public business, is not affected with a public interest or so affected to such an extent as to empower the State of Missouri to regulate plaintiff's rate of charge for insurance to be written in Missouri. There is no constitutional power in the State of Missouri to fix the rates and charges for services rendered by it, and the exercise of such power is a taking of private property for a public use, and deprives plaintiff of its property without due process of law, and a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

(c) Said statute arbitrarily and unreasonably restrains and curtails and interferes with the right of the plaintiff, on the one hand, and its customers, the insured, on the other, to contract as to the rates to be charged by the former and paid by the latter for insurance written, and thereby deprives plaintiff of its liberty, property and right of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(d) Said statute delegates to the defendant the exercise of legislative power, and the administration of legislative

power, but wholly fails to provide any standard rule or guide by which such power shall be exercised by defendant, and leaves the same to defendant's untrammeled whim and caprice, in contravention of Article III, and of Section 1 of Article IV, and of Section 30 of Article II of the Constitution of Missouri.

(e) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that the ascertainment of the aggregate profit of the insurance companies during the five years statutory test period, and reduction of rates, of all companies, inclusive [fol. 10] of plaintiff, to be applied to business of the plaintiff shall be based upon the amount of premiums received less the losses and expenses paid by said companies, instead of upon the amount of premiums earned less losses and expenses incurred by said companies during said period. The profit or loss of an insurance company or a number of insurance companies during a given period can only be ascertained by taking into account as elements the amount of the incurred losses and expenses and the earned premiums of said period and not by taking as elements the received premiums and paid losses and expenses.

The interest on unearned premiums was found by the superintendent to be $2,301,132.

As applied to the business of the test period, 1917 to 1921, said statute as construed and applied by the Missouri Supreme Court in said review proceeding requires that $8,688,365 of premiums received, but not earned, shall be treated as accrued income of the test period, and requires that $1,662,969 of incurred and unpaid losses and expenses shall be rejected as outgo of the test period. Said statute thereby prescribed a method of calculating the companies' profit or loss, for rate making purposes, and undertakes thereby to justify reduction of income of plaintiff thereby increasing its loss upon the conduct of its business of insurance in Missouri, which is unreasonable, arbitrary, capricious, oppressive, fundamentally erroneous and confiscatory. Said statute in purporting to authorize defendant to make an order reducing this plaintiff's rates, based on such method of calculation, confiscates and takes this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the

United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(f) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in the ascertainment of the aggregate profit during the five-year test period, although all premiums received are to be treated as accrued income, yet there shall also be treated as accrued income all interest derived from the investment of unearned premiums. In the years 1917 to 1921 the interest earnings of all companies on their Missouri unearned premiums as found by the superintendent were $2,301,132. Said companies had two separate and distinct activities, underwriting and investment, each of which activities is productive of a profit or a loss. Said element was no part of operating income of said insurance companies on their Missouri insurance business. As applied to the business of the test period, 1917 to 1921 inclusive, said statute as construed and applied by the Missouri Supreme Court in said review proceeding requires that in ascertaining profit or loss for the purpose of fixing rates to be charged by this plaintiff, $2,301,132 interest derived by all companies from the investment of unearned premiums shall be treated as underwriting income of said insurance companies and so applied toward a reduction of this plaintiff's rate of premium for underwriting. Said statute thereby prescribed a method of calculating the companies' profit or loss for rate making purposes, which applied to the business of plaintiff and as justifying reduction of its rates is unreasonable, oppressive, fundamentally erroneous and confiscatory. Said statute in purporting to authorize defendant to make an order reducing plaintiff's rates, based on such a method of calculation, confiscates and take- this plaintiff's property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

[fol. 11] And said statute as so construed and applied by the Missouri Supreme Court to the business of the test period, authorizes an order reducing this plaintiff's rates, not on the ground that this plaintiff has derived or is deriving interest from its unearned premiums but on the ground that other companies have done so and so plaintiff's

rates are reduced because other companies, competitors of plaintiff, in which plaintiff has no interest and over which plaintiff has no control, are alleged to have derived interest from the investment of their unearned premiums.

Said statute as so construed and applied, insofar as it authorizes a reduction of plaintiff's rates because of investment earnings derived by plaintiff, and by plaintiff's competitors, confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(g) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in ascertaining the profit or loss of stock fire insurance companies during the five year test period there shall be deducted from the companies' expenses all excess commissions paid by them to their St. Louis agents, by which is meant, commissions on a scale higher than that in force in the remainder of the state. Said statute as construed and applied by the Missouri Supreme Court to the business of the test period 1917 to 1921 inclusive requires that $2,496,715 of such excess commissions shall be deducted from the companies' expenses, although said sum was actually incurred and paid during the test period by the companies, in good faith, and as an expense which according to the best judgment and discretion of the companies' officers and directors was necessary and reasonable, and was due to competitive conditions between said companies and with others in St. Louis over which plaintiff company had no control.

Plaintiff paid no amount whatever for commissions or any other expense which it could avoid or escape and paid no commissions upon business in St. Louis or elsewhere in Missouri not forced upon it by competition, and same as paid and incurred by plaintiff was sound, justifiable and approved by its officers and directors in the exercise of sound judgment, and plaintiff says that to reduce rates of plaintiff because of any unwarrantable or unreasonable expense paid or incurred by its competitors is confiscatory.

The amount paid by it for commissions to St. Louis agents at rate in excess of rate obtaining in the remainder of the

state did not for any period in this bill mentioned exceed 3.3% of earned premiums.

Said statute as so construed and applied prescribes a method of ascertaining profit or loss for rate making purposes which is unreasonable, arbitrary, capricious, fundamentally erroneous and confiscatory; and in purporting to authorize defendant to make an order reducing plaintiff's rates, based on such methods, said statute confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

(h) Said statute as construed and applied by the Missouri Supreme Court in the aforesaid review proceeding provides that in ascertaining the aggregate profit or loss of the stock fire insurance companies during the test period [fol. 12] there should be deducted from the companies' expenses all federal war taxes on Missouri premiums.

Said statute as construed and applied by said Court to the business of the test period requires that $628,123 federal war tax on Missouri premiums should be deducted from the companies' expenses, although said sum was actually incurred and paid by the companies (including plaintiff) as a war tax exacted by the Federal Government and levied upon the companies' Missouri premiums during the test period.

Said statute as so construed and applied prescribes elements of ascertaining profit or loss for rate making purposes, which are unreasonable, arbitrary, capricious, fundamentally erroneous and confiscatory; and in authorizing defendant Hyde to make an order reducing plaintiff's rates, based on such elements, said statute confiscates plaintiff's property and deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

(i) The provisions of said section 6283, of the Revised Statutes of Missouri 1919, as construed and applied under the laws of said state, are limited to stock fire insurance companies, and exempt therefrom mutual companies, recip-

rocal exchanges, and individuals making insurance upon like hazards as those written by the plaintiff and other stock fire insurance companies in the state of Missouri. Said section distinguishes between fire insurance companies and other insurance companies, individuals and persons, and distinguishes between insurance and other lines of business.

The business of insurance, as conducted by the plaintiff during all the period aforesaid and as conducted by other stock fire insurance companies in Missouri, was also conducted by mutual insurance companies, reciprocal exchanges, and individual insurers, who, and each of them, did, during all the period of time aforementioned, write insurances of like kind and character and upon the same character and type of risks, and were in competition with the plaintiff and other stock fire insurance companies, and said other insurers so mentioned did do a large amount of business, involving hundreds of thousands of dollars of premiums in the state of Missouri from year to year during said period. And the said statute, by thus authorizing and empowering said defendant, superintendent, to reduce rates of the plaintiff and other stock fire insurance companies upon consideration of the experience of stock fire insurance companies in the state, and by exempting from and not including in the provisions of said statute said other insurers, thereby placed great burdens upon the plaintiff and other stock fire insurance companies in the state of Missouri, and thereby does deny to the plaintiff the equal protection of the laws, in contravention of the first article of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

(j) Although the said statute of Missouri authorizes and empowers and orders the superintendent to make a reduction of rates under the circumstances in said statute provided, there is no provision in the statutes of Missouri whereby said superintendent may be compelled to grant any increase of rates, even if such increase be required and necessary to avoid confiscation. Said statutes of Missouri, as construed by the Supreme Court of Missouri, provide and permit no remedy by the plaintiff for review of the order of the superintendent declining to permit an increase

of rates, and do not permit or authorize any action of the [fol. 13] plaintiff to compel or enforce an increase of rates even if upon its experience and upon the experience of all stock companies in the state such increase be necessary to avoid confiscation. Wherefore said rating statutes prohibit and debar it, the plaintiff, from enforcing or compelling any increase of rates to avoid confiscation, and any application for increase would be futile, because said superintendent has since made an additional rate reduction order hereinafter referred to, whereby plaintiff is deprived of its property without due process of law, and is denied the equal protection of the laws, in violation of the first section of the Fourteenth Amendment of the Constitution of the United States, and of section 30 of Article II of the Constitution of Missouri.

(k) Said Section 6283, as so above set out, and the said statute as amended, as hereinafter set out, makes no provision for any notice to plaintiff, or other insurance companies affected by any order to be made, of any hearing before the superintendent of insurance, and gives no opportunity or right to the plaintiff, or other insurance companies to be affected thereby, to be present or to be heard or to present evidence or to present objections to any such proposed order, but permits the superintendent of insurance to make an order without notice to or hearing on the part of or arguments by this plaintiff or other insurance companies interested therein. Wherefore the said section, as originally enacted and as amended, violates Section 1 of Article XIV of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(l) The provisions of said Section 6283 are by the terms thereof made to apply only to and to regulate only the rates by stock fire insurance companies. There are other stock insurance companies authorized by the laws of Missouri and doing a large amount of business in the said state, organized under the second and third paragraphs of Section 6203, namely, the second and third divisions of said section, and creation whereof is authorized by Section 6206 of said Revised Statutes, and foreign companies also falling within such classes; and said other stock companies, during the period mentioned, did insure in large amounts divers

property against the same hazards of fire, lightning, hail or windstorm as were insured by the plaintiff and other stock fire insurance companies and, nevertheless, the plaintiff and other stock fire insurance companies so designated and described by the laws of Missouri, were made subject to such rate regulatory provisions, but other said stock insurers, insuring against the same hazards and insuring property against the hazards of fire, and against the hazards of lightning, and against the hazards of hail, and against the hazards of windstorm, were exempted from and not included in the regulatory provisions herein complained of; and by virtue of such discriminatory nature of the said laws of Missouri it, the plaintiff, by the terms of said statute and enforcement thereof, is denied the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

Par. 13. In the year 1923, the Legislature of the State of Missouri revised and amended section 6283 of Revised Statutes of Missouri to read as follows:

"Sec. 6283. Superintendent to Investigate the Reasonableness of Rates—Authority to Order Reductions.—The superintendent of insurance, upon written complaint of any citizen, or upon his motion, is hereby empowered to investi- [fol. 14] gate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration ex-

pense of such companies and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds."

Thereby, in addition to the considerations applicable to section 6283 as existing before that time, the legislature specifically authorized the superintendent of insurance of said state to take into consideration acquisition cost of the companies, their administration expense and all earnings of such companies, including investment profits, and to empower him to consider whether their underwriting activities were conducted on a basis which he considered reasonably economical, and to consider whether or not their investments have been and are being made in a safe and reasonable manner, and declared the intention of that section to provide that policyholders should not be charged rates which would cover losses occasioned by extravagant methods or unsafe or speculative investment of funds. Said statute provided no guide or rule by which such various considerations were to be applied by the superintendent, but left same to his untrammeled judgment.

Par. 14. After the enactment of said statute and after the same went into force defendant Hyde, on the 9th day of November, 1923, without any notice whatever to plaintiff of any hearing or consideration, or intention to make any order, did make, issue and promulgate an order as follows:

"Insurance Department, State of Missouri, City of Jefferson

To Missouri Inspection Bureau Waterworth & Terry, Managers, Pierce Building, St. Louis, Missouri, and to all Stock Fire, Lightning, Rail and Windstorm Insurance Companies doing business in the State of Missouri:

Upon complaint filed with me that there should be a reduction in the rates charged by the stock fire insurance com-

panies doing a fire, lightning, hail and windstorm insurance business in the State of Missouri, and upon full investigation and hearings and in full compliance with the laws of [fol. 15] Missouri, it appears to me that the rates charged in this State by the stock fire insurance companies, for the five years next preceding such investigation, to-wit, the years 1918 to 1922 inclusive, are producing a profit in excess of what is reasonable.

Accordingly, you and each of you are hereby notified that I have this day ordered a reduction of fifteen per cent (15%) in rates now authorized by the Missouri Inspection Bureau and being collected by the aforesaid companies on fire, lightning, hail and windstorm business written in the State of Missouri, which reduction in my judgment will leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the State.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of December, 1923, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a classification or classifications, which meets the approval of the Superintendent of Insurance, the Superintendent will apply such reduction in such manner as appears to him to be just and equitable.

(Signed) Ben C. Hyde, Superintendent of Insurance of the State of Missouri.

Dated at Jefferson City, Missouri, this 9th day of November, 1923."

A copy of said order was served upon the Missouri Inspection Bureau as agent of the plaintiff herein.

On and prior to making the said order of November 9, 1923, said defendant made no investigation, held no hearings whatever, and no evidence was offered or produced before him, or if the defendant had any pretended hearing, or made any pretended investigation with respect to the matters in said order, it was without notice to plaintiff, or any agency of it, and without any reasonable opportunity or any opportunity to plaintiff to be present and plaintiff was not present.

Par. 15. The defendant Hyde, so proceeding without notice to or knowledge of the plaintiff of his supposed investigation, and without notice or knowledge of his said hearings, and in the absence of the plaintiff, did make his said rate order and therein did purport to take into account the experience of stock fire insurance companies in the state of Missouri for the preceding five years, namely, the calendar years 1918 to 1922 inclusive; and plaintiff is informed and believes and therefore states that he did take into account all the various matters which are recited in the statute as matters which he might take into consideration, namely, the supposed profits of all stock fire insurance companies in the state, items of acquisition cost and administration expense of competitors of it, the plaintiff, over which the plaintiff had no control and the expense of which said competitors' business was not sanctioned, approved or incurred by plaintiff; and the said defendant Hyde did take into account all the earnings of such other stock companies, including investment profits which, as to divers of said other stock companies, were in large sums of money; and did take into account also investment profits asserted and [fol. 16] claimed by the said defendant to have been earned or derived by plaintiff, although the plaintiff had no investment profits of any kind in the state of Missouri, or in any wise derived from its business of insurance conducted in said state. Plaintiff is informed and believes and therefore states that said defendant did, upon standards of supposed economy, reject large items and elements of expense in fact incurred and paid by various stock insurance companies and various expenses incurred and paid by the plaintiff, and did disallow and refuse to consider the same; plaintiff's business was conducted economically and soundly. And plaintiff is informed and believes and therefore states that the defendant did reject certain elements of outgo and take into account, as supposed items of income, various other sums, upon the ground that investments of certain stock companies other than it, the plaintiff, were not safe and reasonable; and did likewise, as to certain other such income and outgo, take like action respecting income and outgo of the plaintiff. In each and every of the said matters aforesaid defendant, by his said act and conduct and by his said order and proceeding without notice and by consideration of the elements by him employed in making his order,

did violate the constitutional rights of the plaintiff, and did thereby take the property and liberty of the plaintiff without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

Par. 16. The experience of all stock fire insurance companies in the aggregate, in Missouri, for the years 1918 to 1922 inclusive, upon the basis of premiums received as income and losses and expenses as outgo, (without either rate order applied,) was as follows:

Premiums received	$91,004,156
Losses and expenses paid	90,937,586
Profit	$66,570

In the same years the premiums earned and losses and expenses incurred (without either rate order applied) were as follows:

Premiums earned	$83,206,537
Losses and expenses incurred	92,137,811
Loss	$8,931,274

Said rate order last described, if applied to and enforced against the plaintiff, would require the plaintiff to put in force a reduction, as therein specified, and cause it to write rates at a lower rate of insurance than provided for by the rate order previously above set forth, and thereby still further increase the loss of the plaintiff, and the rate level, if so established, would be a level wholly inadequate to meet losses and reasonable expenses, or to give to the plaintiff any compensation whatever for the risks to be assumed by it under policies of insurance, and cause it to do business in Missouri at a loss, and thereby would be forced either to do business at an actual loss or withdraw from doing business in Missouri, and thereby lose the value of all of its agency plants, established business, maps, surveys and rating records aforesaid. In either alternative, plaintiff would be deprived of its property without due process of law, if said rate reduction order be enforced against it, in violation of section 1 of the Fourteenth Amendment of the Constitu-

tion of the United States, and section 30 of Article II of the Constitution of Missouri.

The plaintiff, upon the measure of its individual experience, taking into account earned premium as an element of income and incurred loss and expense as elements of outgo during the five-year period before the date of the rate order, [fol. 17] and during the period since that time, has during each such period, lost money and made no money whatsoever upon the conduct of its business of insurance in the state of Missouri. To reduce its rates of premiums upon its business so by it conducted at a loss, and thereby increase the loss which it will sustain thereon, is not justified by taking a balance as between premiums received and losses and expenses paid, as applied to the aggregate experience of all companies in the state for the five-year test period, and by striking a balance by employment of such method to thereby justify a reduction of income of the plaintiff. Even taking into account premiums received as income and losses and expenses paid as outgo, and interest on unearned premium as income, as applied to the five-year test period preceding the said order of the defendant, Hyde, the rate reduction so by him ordered would be destructive of all profit to the plaintiff.

Par. 17. The said rate reduction order, as justified by the statute, sustains the said reduction on the ground that in the years 1918 to 1922 inclusive, the aggregate profit of all companies upon their Missouri business was in excess of what is reasonable, and the individual experience of plaintiff was in nowise considered nor contemplated by said defendant Hyde in his proceeding under the said statute. The order, if so applied to the plaintiff, would compel this plaintiff to reduce its rates, not upon any assumption that the plaintiff had made or is making any unreasonable profit, or any profit whatever, but upon the basis that other insurance companies have derived an unreasonable profit from their conduct of insurance business in Missouri, or from investment of funds by them, or otherwise. In truth and in fact this plaintiff did not, in the said years so adopted as a test, namely, the years 1918 to 1922 inclusive, nor in the period since that time, derive, nor is it now deriving any unreasonable profit from its insurance business in Missouri, but during such respective periods it has operated and now

operates its business of insurance in Missouri at a loss. The total income and outgo of this plaintiff on its business of insurance in Missouri, during the years 1918 to 1922 inclusive, were as follows:

Income (earned premiums)	$2,272,333
Outgo (incurred losses and expenses)	2,711,762
Loss	$439,429

During the period since 1922 plaintiff has upon said basis suffered a large loss, and has made no profits whatever upon its business in Missouri, and its experience was no more favorable than in any of the periods above tabulated.

Defendant Hyde's said reduction order, in directing plaintiff to reduce its rates when it has lost and is losing money on its business in Missouri, on the alleged ground that other companies have made or are making an unreasonable profit, and in taking into account supposed profits of the plaintiff not derived from its business of insurance in the state of Missouri, confiscates and takes this plaintiff's property without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of the state of Missouri.

Par. 18. In the defendant Hyde's pretended calculation of profit or loss for the said five-year test period, he took into account as income certain amounts in no wise income from business of insurance and rejected proper income arbitrarily and did adopt arbitrary, confiscatory and unjustifiable elements, and plaintiff is informed and believes and therefore states the fact to be that defendant Hyde took into consideration as income certain large sums of money repre- [fol. 18] sentative of investment profits, being interest on the capital and surplus of plaintiff and other insurance companies doing business in Missouri during said period; and also took into account interest on unearned premiums of said companies. Said insurance companies, including the plaintiff, have two separate and distinct activities, underwriting and investment, each of which is productive of a profit or loss. The method of calculation so employed took income from the investments of a distinct department of the business of said companies and applied the same toward a

reduction in rates in their underwriting department, and justified the said rate order by so doing. The effect of such method so employed is to turn an actual loss of the companies doing business during said period into an apparent profit upon their business of insurance, and to apparently overcome the loss by them sustained on their business of insurance by application of income from their invested assets. Said action of the defendant Hyde in his said rate order, in so taking into consideration income of said various insurance companies other than their underwriting income, and taking into account such investment income of insurers other than the plaintiff, and taking into account interest on capital and surplus of the plaintiff, and taking into account capital and surplus in still much greater amount of other insurance companies, and in taking into account interest on unearned premiums of plaintiff and of other insurance companies in a still greater sum is unreasonable, fundamentally erroneous, unjust and confiscatory in applying the same to the plaintiff, and deprives the plaintiff, by virtue of the rate order based on such considerations, of its property and liberty without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

Par. 19. The defendant Hyde, in his said considerations employed in making his said rate order did reject from consideration great sums of expenses in fact incurred and paid by insurance companies doing business in the state of Missouri during said test period, rejecting as plaintiff is informed and believes and therefore states items of commissions incurred and paid to agents, taxes imposed by law and for which said companies were liable and which were by them paid; and certain large sums were by him rejected from outgo as acquisition cost and administrative expense of which he, the said defendant, disapproved and which were by him considered and regarded as not reasonable, or economical, and undertook to substitute his judgment for that of the plaintiff and its officers and the officers of other insurance companies as to investments, commissions, expenses in the conduct of their business, and in general the said defendant undertook to exercise visitorial powers over matters of internal management of the

plaintiff and other insurance companies, and thereby invaded the inherent right of the plaintiff to manage and conduct its own affairs, and did thereby penalize and reduce the rates of the plaintiff as respects the said divers matters in no wise within its control and largely beyond its power and over which it had no control or management, and respecting which there was in no wise any impropriety, unsoundness, lack of economy, or mismanagement, and in so applying said matters to a reduction of rates of it, the plaintiff, the plaintiff is deprived of its property and liberty without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of Article II of the Constitution of Missouri.

Plaintiff is not able to state the matters in the foregoing paragraph with more or greater particularity because no notice was given it so that it might be present upon consideration of said matters, nor was it present or repre-
[fol. 19] sented when said matters were under consideration or decided, but the plaintiff says that the said matters so aforementioned and so unlawfully and unconstitutionally considered and taken into account by the said defendant, as in the foregoing paragraphs heretofore set forth, were so great that his action therein, had his consideration thereof come to a contrary conclusion, would, of necessity, have produced a contrary conclusion on his part and left the said rate order without any justification.

Par 20. "Interest on unearned premium" is the amount derived upon the invested part of unearned premium in hand during specified periods. Owing to the fact that the same is not segregated in the assets of insurance companies, and that a large part of their assets are kept in liquid and uninvested form, and that the same shifts from time to time, it is a matter of great difficulty, almost an impossibility, to calculate the amount of interest on unearned premium.

The same is not any item proper for consideration in considering the income of an insurance company from its insurance activity.

During each of the respective periods in this petition above mentioned, at any time from the year 1917 to the

present time, the interest on unearned premiums by plaintiff derived and earned did not, in any of said periods, exceed in amount two per cent of the earned premiums of the plaintiff.

Two per cent of the earned premiums is a sum adequate to cover the interest on unearned premiums of all the companies doing business in the state of Missouri during any of the periods above in this petition recited.

Par. 21. Said Section 6283, as so enacted in 1923, namely, the said section as amended and as now existing, constitutes the sole and only authority for action by the defendant in making his said rate reduction order in paragraph 14 above set forth. Said statute is unreasonable, arbitrary, unconstitutional and void in each respect in the twelfth paragraph above recited and there alleged, as respects said section before amendment, which allegations in said paragraph 12 are here incorporated by reference as if here again set forth. In addition thereto, said section, as existing since its enactment in the year 1923 and as now existing, is unreasonable, arbitrary, confiscatory, unconstitutional and void, for the following reasons:

(m) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance shall take into consideration the acquisition cost and administration expenses of such companies, and shall consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis; and that said statute thereby gives said Superintendent of Insurance visitorial powers over the internal management of said companies and invades the inherent general right of said companies to manage their own affairs, and unreasonably interferes with said companies' inherent right of management thereof; and, therefore invades rights of plaintiff and likewise deprives plaintiff of its liberty and property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(n) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance

shall consider whether or not said companies' investments have been, and are being, made in a safe and reason-
[fol. 20] able manner; and said statute thereby undertakes to give said Superintendent of Insurance visitorial powers over the internal management of said companies and invades the inherent general right of said companies to manage their own affairs and to make their own investments, and is an unreasonable interference with said companies' inherent right of management and control thereof; and undertakes to authorize said Superintendent to control making by said companies of investments of funds owned by their stockholders, and to substitute in place of the discretion of the directors of said companies, the opinion and judgment of the Superintendent of Insurance; and likewise invades the rights of plaintiff and therefore deprives plaintiff of its liberty and property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(o) Said statute provides that in determining the question of rates and profits, said Superintendent of Insurance shall take into consideration all earnings of such companies, including investment profits; and said statute thereby undertakes to authorize and direct said Superintendent of Insurance, in determining whether said companies, including plaintiff, have made a profit or loss, and in fixing rates of premium for underwriting insurance risks, to take into account the profits and earnings of such companies, including plaintiff, from sources wholly distinct, separate and apart from underwriting.

Plaintiff has a capital derived from stockholders, and in addition has a surplus, in part contributed by stockholders and in part accumulated from the earnings of the plaintiff in various states of the Union other than Missouri, and which surplus is the property of the stockholders and independent in its origin of policies of insurance issued to policy holders in Missouri.

Profits made and the losses sustained upon the investment of capital and surplus are entirely distinct and separate from profits and losses from underwriting activities of plaintiff, and are separate and distinct therefrom.

The investment of said funds and the conduct of such investment is uniformly made at the home offices of the plaintiff and outside of the State of Missouri and is in no wise involved in or a part of the business of the plaintiff conducted in the State of Missouri.

Said provisions of the said statute of Missouri last above referred to, if applied by an order of the defendant Hyde based thereon, compel the plaintiff to write policies of insurance at an amount of premium, reducing its return thereon to the extent and by the amount that same is reduced by applying thereto the aforesaid investment earnings and profits.

For all of the aforesaid reasons said statute is unreasonable, arbitrary and confiscatory, and deprives plaintiff of its property and liberty without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri.

(p) Said statute delegates to said Superintendent of the Insurance Department legislative powers, and undertakes to vest in him an arbitrary and untrammeled discretion in the exercise of such power, but wholly fails and omits to prescribe any certain guide, rule of action or standard by which the power and discretion therein granted are to [fol. 21] be exercised by him; all of which is in violation of Article III of the Constitution of Missouri and of Section 1 of Article IV of the Constitution of Missouri, and of Section 30 of Article II of the Constitution of Missouri, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth

Par. 1. Unless this Court grants the relief herein prayed for, and if either of said reduction orders should be enforced, the plaintiff would sustain irreparable injury and damage, in that plaintiff would either be compelled to issue policies of insurance and conduct its business at a financial loss in Missouri, or cease doing business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and goodwill aforesaid, which are of great pecuniary value. If de-

fendant Hyde's said order should be enforced and applied and the plaintiff should refuse to comply therewith, defendant Hyde will proceed to revoke the licenses of plaintiff and its agents to do business in Missouri, and defendants will institute and prosecute criminal actions against plaintiff and its many hundred agents in Missouri, and plaintiff and its said agents will thus be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties, accumulating in respect to plaintiff in the sum of many thousand- of dollars.

The actual loss to the plaintiff, if the said rate orders aforesaid be enforced against it, and the diminution of the income of the plaintiff for each day, which it would suffer upon continuance of its business in Missouri, if the said rate orders be not enjoined, would amount to not less than $50.00 each day that plaintiff would be required to write its insurance at such reduced rates.

Par. 2. The defendants have threatened, and unless restrained and enjoined by this court will take unlawful and unconstitutional action against and interfere with the business of the plaintiff in the following particulars:

Each defendant has asserted and if not enjoined, will assert and publish to the insuring public of Missouri, that the premium charges at the rates at which the plaintiff has been exacting the same, and which it proposes to exact upon its contracts of fire insurance, namely the rates without deduction therefrom of the decreases ordered by the defendant Hyde, are unlawful, and that the public need not pay or contract to pay the same to the plaintiff; whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may and would demand and exact upon its insurances on properties in this state, and unless the defendants be enjoined, they will bring or cause to be brought proceedings to enjoin or interfere with the collection by the plaintiff of such premium charges; and will cause actions and proceedings to be brought against the plaintiff and against its officers, directors, employes and agents, in which said proceedings enormous and excessive fines and penalties prescribed by the laws of Missouri for violation of said insurance laws

would be imposed, and each issuance of a policy by or on behalf of plaintiff treated as a separate violation of law, and each exaction of premium treated as a separate and distinct offense, and each application of such pre-existing rate treated as a separate offense, and will bring or cause to be brought actions to impose fines and actions to imprison the said representatives of the plaintiff before mentioned, and will bring or institute proceedings to revoke and cancel licenses of the plaintiff and agents of the plain-
[fol. 22] tiff, of whom there are many in Missouri, and will, unless restrained, refuse renewal of the license of the plaintiff in this state and of its agents upon the ground of failure to conform to such void orders made under such unconstitutional statutes aforesaid, and would subject the plaintiff to great and irreparable loss and damage and subject plaintiffs, its officers, employes and agents to a multiplicity of suits, and such action of the defendants would each be a trespass by defendants under a void rate order and under a void and unconstitutional law; and the defendants do not have sufficient financial responsibility to answer adequately in the damages that would be sustained by plaintiff; and it would be wholly impossible to adequately and legally measure the amount and extent of such damages; and such conduct and actions would deprive the plaintiff of its property and its liberty of contract, without due process of law and deny to it, the plaintiff, the equal protection of the law.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions of the defendants against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted, the property of the plaintiff will be confiscated and the plaintiff will suffer irreparable loss and injury.

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory injunction is granted, in this: That if the plaintiff should comply and conform with the said orders of the defendant Hyde and write its insurance at the rates of premium by him ordered and directed, namely, by making reductions as provided for in his rate orders, and if it is subsequently held by this

court that such demands, orders and requests are confiscatory or that said statutes are illegal and unconstitutional, and that operation of said statutes or the operation of said rate orders are unconstitutionally applied to the plaintiff, it will be impossible for the plaintiff ever to recover or collect from persons taking insurance with it, the plaintiff, the premiums representing the difference between the rates of premiums so collected and the rates of premiums which the plaintiff is legally entitled to charge and receive as aforesaid, which in many cases are small but are large in the aggregate, and the cost and expense of undertaking collection thereof would exceed the amounts therein respectively involved, and the said difference between the lawful rates as the same exist without application of said rate orders, and the said rates with the deductions in said rate orders applied thereto, when applied to the business by the plaintiff conducted from day to day in the State of Missouri would amount to not less than $50.00 each day, and will be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had, in this:

If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will before the hearing thereon, have it within their power and they will proceed to enforce said rate reduction orders as against the plaintiff, and will in the matter of the 15% reduction order designate the class or classes to which it is to apply, and will institute a multiplicity of suits against plaintiff on each of the points aforesaid, and will proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Missouri, on the alleged ground that plaintiff was not complying with said rate reduction orders.

[fol. 23] Wherefore, the premises considered, plaintiff prays:

1. That the said Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and the said North Todd Gentry, Attorney General of the State of Mis-

souri, who are made parties defendant hereto, be summoned to appear and be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

2. That it be ordered, adjudged and decreed:

(a) That Section 6283, R. S., Mo., 1919, and Section 6283 as enacted and amended in 1923, are each unconstitutional and void and contrary to and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of Missouri.

(b) That the 10% rate reduction order of October 9th, 1922 made by the defendant Ben C. Hyde, and that the 15% rate reduction order of November 9th, 1923 are and each of them is, as against this plaintiff, unreasonable, confiscatory, unconstitutional and void, and they and each of them operate to deprive the plaintiff of its liberty of contract and of its property, without due process of law, and to deny to the plaintiff the equal protection of the laws, in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed action of the defendants and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employes, or any of them, to actions for penalties or fines or imprisonment, or revocation of licenses, are in violation of the rights of the plaintiff under section 1 of the 14th Amendment of the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri, in that they deprive the plaintiff of its liberty of contract and of its property, without due process of law, and deny to the plaintiff the equal protection of the laws.

3. That the court make a temporary restraining order, without notice to the defendants, to be effective until the hearing upon plaintiff's application for interlocutory injunction, and that upon such hearing an interlocutory injunction issue, and that by each of said orders, namely, the temporary restraining order and the order for interlocutory injunction, the defendants Ben C. Hyde, Superintend-

ent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives, and all others acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be and they are hereby restrained and enjoined from taking any proceedings whatever under or pursuant to said orders or either of them, and from enforcing or attempting to enforce or from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the officers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in [fol. 24] anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; that said defendants and others heretofore mentioned be and they are hereby enjoined and restrained from taking any steps or proceedings whatsoever under or pursuant to such orders, or from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid, or from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof, or from making any direction respecting application thereof, or from

proceeding against plaintiff, its agents, or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding in any action, suit, or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders.

That the defendants be restrained and enjoined from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919, or said section as amended; that said defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

That the interlocutory injunction above prayed for, issue against defendants upon five (5) days' notice to them and to the Honorable Sam A. Baker, Governor of Missouri, respectively, of the intended application therefor, enjoining and restraining the defendants as above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before three judges as is by statute prescribed in such cases; that a temporary restraining order may be issued as above prayed, without notice, to be effective until the date to be set by the court and until hearing of application for temporary or interlocutory injunction; that upon final hearing in this cause, which the plaintiff prays may also be had before three judges as provided by law, and that said interlocutory injunction shall be made permanent, and that the Court grant plaintiff such other and further relief as to the Court may seem just and proper; and that plaintiff recover of defendant its costs herein.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff, by John S. Leahy, Solicitor.

[fols. 25 & 26] *Duly sworn to by Paul W. Terry. Jurat omitted in printing.*

[fol. 27] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Feb. 14, 1928

Now, on this 14th day of February, 1928, comes the plaintiff herein and files and presents to the undersigned, judge of this court, its verified bill wherein it is prayed that a temporary restraining order issue against the defendants, and each of them, as in said bill prayed.

And the court finds, from the allegations of said verified bill as follows:

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory injunction is granted, in this: That if the plaintiff should comply and conform with the rate orders of the defendant Hyde in the bill set forth and write its insurance at the rates of premium by him ordered and directed, namely, by making reductions as provided for in his rate orders, and if it is subsequently held by this court that such demands, orders and requests are confiscatory or that said statutes are illegal and unconstitutional, and that operation of said statutes or the operation of said rate orders are unconstitutionally applied to the plaintiff, it will be impossible for the plaintiff ever to recover or collect from persons taking insurance with plaintiff, the premiums representing the difference between the rates of premiums so collected and the rates of premiums which the plaintiff is legally entitled to charge and receive, which in many cases are small but are large in the aggregate, and the cost and expense of undertaking collection thereof would exceed the amounts therein respectively involved, and the said difference between the rates as the same exist without application of said rate orders, and the said rates with the deductions in said rate orders applied thereto, when applied to the business by the plaintiff conducted from day to day in the State of Missouri would amount to not less than $50.00 each day, and will be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this court without notice to the de-

fendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had, in this:

[fol. 28] If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will before the hearing thereon, have it within their power and they will proceed to enforce said rate reduction orders as against the plaintiff, and will in the matter of the 15% reduction order designate the class or classes to which it is to apply, and will institute a multiplicity of suits against plaintiff on each of the points aforesaid, and will proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Missouri, on the alleged ground that plaintiff was not complying with said rate reduction orders.

And the court finds that the plaintiff is entitled to a temporary restraining order as prayed, and that immediate and irreparable injury and damage will result to the plaintiff before notice can be served and a hearing had unless such temporary restraining order shall issue without notice, according to the prayer of the bill;

Now, Therefore, it is by the Court ordered that until the 21st day of February, 1928 (unless within that time this Court otherwise orders) and during the period of extension of this order if it shall be extended, the defendants Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives and all others acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be and they are hereby restrained and enjoined from taking any proceedings whatever under or pursuant to said orders or either of them, and from enforcing or attempting to enforce or from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the offi-

cers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; that said defendants and others heretofore mentioned be and they are hereby enjoined and restrained from taking any steps or proceedings whatsoever under or pursuant to such orders, or from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid, or from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof, or from making any direction respecting application thereof, or from proceeding against plaintiff, its agents or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding in any action, suit, or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders.

That the defendants be restrained and enjoined from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919, or said section as amended; that said defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the

same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

Provided, however, that plaintiff shall file herein its bond in the penal sum of $2,000, in form and with security to be approved by this Court, or the undersigned, judge thereof, conditioned for the payment of such costs and damages as may be incurred or suffered by any party wrongfully enjoined or restrained by this temporary restraining order.

And now comes plaintiff and forthwith presents for filing its said bond, as so above required, which said bond and the surety thereon appearing are by the Court hereby approved.

It is further ordered that a copy of this order, duly certified by the Clerk, be served upon the defendants.

Merrill E. Otis, Judge.

[fols. 29 & 30] UNITED STATES OF AMERICA,
Central Division of the
Western District of Missouri, sct:

I hereby certify that I served the within temporary restraining order in Jefferson City, Missouri, on the 15th day of February, 1928, by delivering a copy thereof, duly certified by the clerk, to North Todd Gentry, Attorney General of the State of Missouri, and to A. J. Rathbun, Deputy Superintendent of the Insurance Department of the State of Missouri, the Superintendent of said Insurance Department being absent from the Central Division of the Western District of Missouri.

Asa W. Butler, United States Marshal, by Anton B. Richter, Deputy Marshal.

Marshal's Fees: 2 Services, $4.00.

UNITED STATES OF AMERICA, sct:

I, Edwin R. Durham, Clerk of the United States District Court for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a true and complete copy of the Marshal's Return on the Temporary Restraining Order in the case wherein National Fire Insurance Company of Hartford is plaintiff and Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, et al., are defendants.

The Clerk of the Supreme Court of the United States or the Attorney for the Appellant is authorized to attach the above copy of the return to the transcript heretofore prepared by me in the above cause.

Witness my hand as Clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 20th day of May, A. D. 1929.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy. (Seal of the United States District Court of Missouri, Western Division, Western District.)

[Endorsed:] No. 91. United States District Court for the Central Division of Western District of Missouri. National Fire Insurance Co., of Hartford, Plaintiff, vs. Ben C. Hyde, Superintendent of Insurance Department of State of Missouri, and North Todd Gentry, Attorney General for the State of Missouri, Defendants. Temporary restraining order. Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

[fols. 31 & 32] Cost bond on restraining order for $2,000, approved and filed February 14, 1928, omitted in printing.

[fols. 33 & 34] In United States District Court

Order Continuing Restraining Order—Filed Feb. 21, 1928

Now on this 20th day of February, 1928, the court finds that the hearing of the application for interlocutory injunction herein has been tentatively set for February 21, 1928, and that it is impossible for three judges to convene to hear said application before March 10, 1928; and for that reason it is by the court ordered that the hearing of said application be and the same is continued until ten o'clock A. M. on said last named date; and it is by the court further ordered that the temporary restraining order issued herein be and the same is hereby continued in full force and effect until the hearing and determination of said application for interlocutory injunction; and that the clerk notify the parties accordingly.

Merrill E. Otis, Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

APPLICATION TO DISQUALIFY JUDGE MERRILL E. OTIS—Filed Mar. 10, 1928

Come now the defendants in the foregoing cause and state that the within suit was filed before and in the court of the Honorable Merrill E. Otis, District Judge of the United States District Court for the Central Division of the Western District of Missouri; that said Judge Otis is a material witness for the defendants herein in the trial of this cause, in that said Judge Otis, in January 1922, as Assistant Attorney-General of the State of Missouri, represented the defendant, Ben C. Hyde as counsel in the making of a certain stipulation by and between the said defendant Hyde and this plaintiff, whereby said plaintiff, for certain valuable considerations, agreed not to bring an injunction suit to restrain the operation of certain reduction order in the matter of fire insurance rates to be made by said defendant Hyde in the State of Missouri, and that said plaintiff would not attack the constitutionality of Section 6283 and 6384 of the statutes of the State of Missouri, constituting the so-called Fire Insurance Rating Act of said state; that defendants expect to use said Judge Otis as a witness for the purpose of establishing the execution of said stipulation and the facts and circumstances surrounding the making of same.

Wherefore your applicants herein, being the defendants in the foregoing cause, pray the court that the facts as hereinbefore set out, namely that said Judge Otis is a material witness for the defendants herein, and the matters and things about which he will be called upon to testify at the trial of this cause, be entered on the records of this court and that this court make an order that an authenticated copy of said record shall be forthwith certified to the Senior Circuit Judge of the United States Circuit Court of Appeals, Eighth Circuit.

North T. Gentry, Arthur M. Hyde, John T. Barker, Floyd E. Jacobs.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 36] IN UNITED STATES DISTRICT COURT

ORDER CERTIFYING APPLICATION TO DISQUALIFY *to* SENIOR CIRCUIT JUDGE—Filed Mar. 10, 1928

Now on this 9th day of March, 1928 the defendants by and through their counsel, file their application to this court in the foregoing cause and in all similar cases now pending in this court and being numbered 64 to 211 inclusive, for an order finding that Merrill E. Otis, the District Judge of the Western District of Missouri, is a material witness in the above entitled cause for the defendants herein, and for that reason is disqualified to set in a trial or any hearing in which matters and controversies are to be determined by and between the plaintiff and the defendants herein.

Therefore said application is by the court taken up and heard and determined, and the court finds from said application that he is to be called by the defendants as a witness for the defendants herein and in all cases pending in this court, being numbered from 64 to 211 inclusive, and for that reason is disqualified to sit in any hearings, matters, or controversies to be determined between said parties. It is further ordered that this fact be entered on the records of this court in cases numbered 64 to 211 inclusive and that an authenticated copy thereof and relating to the cases pending in this court number 64 to 211 inclusive be forthwith certified to the senior Circuit Judge of this Circuit.

Merrill E. Otis, Judge of the U. S. District Court for the Western District of Missouri.

[fols. 37 & 38] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING HONORABLE ALBERT L. REEVES—Filed Mar. 24, 1928

Whereas, Honorable Merrill E. Otis is a material witness for the defendants in the case above entitled and in similar cases numbered 64 to 211, inclusive, which are pending in the United States District Court of the Central Division of the Western District of Missouri, and Honorable Merrill E. Otis has caused that fact to be entered on the records of the court and also an order that an authenticated copy

thereof shall be forthwith certified to the senior circuit Judge of this circuit present therein, and whereas the undersigned has received such authenticated copy of that order and of the other orders above mentioned,

Now, therefore, I do by these presents designate and appoint Honorable Albert L. Reeves, United States District Judge of the Western District of Missouri, to hear, try and dispose of the case above entitled and the similar cases pending in the court above named, numbered from 64 to 211, inclusive, and to make such orders, decisions, judgments and other directions as in his opinion shall be just. And Honorable Albert L. Reeves is hereby vested with all the authority, power and jurisdiction in the United States District Court for the Western District of Missouri in these cases that the Honorable Merrill E. Otis would have had if he had not been disqualified.

In witness whereof I have hereunto set my hand and seal this twenty-first day of March, 1928.

Walter H. Sanborn, Senior Circuit Judge Eighth Circuit.

[fol. 39] In United States District Court

Amendment to Bill of Complaint—Filed Mar. 29, 1928

Comes now plaintiff, by its solicitors, and by leave of Court first had and obtained amends its bill in equity herein, namely, by insertion immediately after paragraph 21 of the third division of said bill, and immediately preceding the fourth division of said bill, the following:

"Par. 21½. Plaintiff further avers that after the making of the order of the defendant Hyde, of date October 9, 1922, this plaintiff did not, nor did any other person for it, nor did any other stock fire insurance company doing business in Missouri, within thirty days thereafter or at any other time, designate classes to which the same should apply, and thereupon said Superintendent of the Insurance Department of the State of Missouri did not designate any class or classes of insurance to which the same should be applied by plaintiff or other stock companies at any time prior to February 1, 1928.

And plaintiff avers that, in the period of more than five years intervening, great changes occurred and took place in the insurance experience in the State of Missouri, both as respects this plaintiff and stock fire insurance companies generally in said state, as respects their profit or loss in the state, in that the losses of the plaintiff upon its business of insurance in said state and upon each of such affected classes, namely, fire, lightning, hail and windstorm, were and each of them was materially worse than before that time; and the losses therein were in much greater proportion of premiums than theretofore; and the said defendant, Superintendent, did not have any hearing, or make any investigation, or give any notice to plaintiff prior to making his said designation of classes; wherefore plaintiff says that by the failure of the said defendant to make any designation of classes as by statute provided, namely, with promptness after the expiration of thirty days from said order, and by permitting and allowing the same to remain without change for period of more than five years, thereby the defendant lost all power to make any designation of classes or to make said rate order effective or to revive the same or so to do without any notice or hearing; wherefore the plaintiff says that said effort to make said rate order effective by such designation of classes is void and without power in him, the said defendant.

[fol. 40] And plaintiff further avers that the other of said rate orders of the defendant aforesaid, namely, that of November 9, 1923, has not been by the said defendant Superintendent at any time made effective, nor any classes designated to which the same should apply; nor has plaintiff, nor any other fire insurance company in the state, made such designation; wherefore the plaintiff says that no power exists in the defendant Superintendent to make any classification and his said rate order has by such failure of designation become and remains a nullity, and that no power exists or remains in the said defendant to enforce or effectuate the same.

And plaintiff further avers that notwithstanding the want of power of the said defendant Superintendent, and notwithstanding the complete nullity of his said rate orders, by failure to enforce or make effective or designate classes thereunder within any reasonable period after the entry of

the same; yet the defendants, notwithstanding, threaten, and unless restrained will claim vitality in said respective rate orders, that the same are binding and bound to be observed by it, the plaintiff."

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

Duly sworn to by Paul W. Terry. Jurat omitted in printing.

[fols. 41 & 42] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT—Filed Mar. 29, 1928

Comes now plaintiff in the above entitled cause, and by leave of Court, first had and obtained, amends its Bill in Equity, by inserting therein on page 7 thereof, in paragraph 11, immediately following the second tabulation therein appearing, the following:

"In the year 1927, the total income and outgo of this plaintiff on its business of insurance in Missouri were as follows:

Income (Earned premiums)	$733,038
Outgo (Incurred Losses and Expenses)	909,089
Loss	$176,051"

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

Duly sworn to by D. J. Gallagher. Jurat omitted in printing.

[fol. 43] IN UNITED STATES DISTRICT COURT

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed April 11, 1928

Now comes the plaintiff in the above entitled cause and respectfully shows to the Court that plaintiff has filed herein its verified bill, wherein it prays for an interlocutory

injunction against the defendants. And now upon the facts alleged in said verified bill the plaintiff moves and prays the Court to issue herein an interlocutory injunction, to remain in full force and effect until final hearing, determination and decree herein; and that by said interlocutory injunction, the defendants Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri and North Todd Gentry, Attorney General of the State of Missouri, and each of them and their deputies, attorneys, solicitors, agents, servants and representatives, and all others acting or claiming or assuming to act for or under the authority or in the name of said defendants, or either of them, and all other persons who now or shall hereafter seek or attempt to enforce the said rate reduction orders, or either of them, made by the defendant Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri on October 9th, 1922, and on November 9th, 1923, be restrained and enjoined until final hearing and decree herein, or until otherwise ordered by this Court, from taking any proceedings whatever under or pursuant to said rate reductions or either of them, and from enforcing or attempting to enforce and from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said orders, or either of them, of the said Hyde, as aforesaid, against the plaintiff or against any of the officers, agents, or employes of the plaintiff, or against Waterworth and Terry, doing business as Missouri Inspection Bureau, an agency of the plaintiff; and from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective said orders, which would in anywise affect the rates or the premiums or the charges of the plaintiff because of said rate orders; and from taking any steps or proceedings whatsoever under or pursuant to such orders; and from advising, instituting, prosecuting or aiding any action, suit or proceeding of any kind or character, under the laws of the State of Missouri or otherwise in furtherance thereof, or pursuant to said statute aforesaid; and from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States Manager, employees, attorneys-in-fact, agents, adjusters, inspectors, rating bureaus, inspection

bureaus, or any other persons in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal to obey, observe or comply with said orders or either of them, or any of the terms, commands, or requirements thereof; and from making any direction respecting application thereof; and from proceeding against plaintiff, its agents, or employes, in anywise because of exaction of premiums by the plaintiff, at rate level unaffected by the said rate orders, or because of the delivery of policies specifying such rates; and from interfering with or attempting to interfere with, and from advising, instituting, prosecuting or aiding in any action, suit, or pro- [fols. 44 & 45] ceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes from charging, receiving or collecting the rates of premium charged for insurance, which would be lawful except for said rate orders; and from in anywise proceeding under, enforcing or taking any action whatsoever under or pursuant to or authorized by Section 6287 R. S. Mo., 1919; and from revoking the license of the plaintiff or any of its agents or representatives; and from refusing to renew license of the plaintiff or any of its agents or representatives, or withholding the same, upon the ground of supposed violation by them, or any of them, of the said statutes or rate orders or any of them, above referred to.

Plaintiff has given more than five days' notice of the hearing upon plaintiff's application for interlocutory injunction herein, to the Governor of the State of Missouri and to the defendants herein, and each of them. And plaintiff prays that its application for said interlocutory injunction be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, as by statute prescribed in such cases.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff, by William S. Hogsett, Solicitor.

[fol. 46] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR STAY UNLESS RESTITUTION BE MADE—Filed April 18, 1928

Now at this date come the defendants and ask the court to dismiss or stay the temporary restraining order heretofore issued in this cause for the following reasons:

First, because on the 9th day of October, 1922, the Insurance Department of Missouri ordered a ten per cent reduction of insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15th, 1922; and thereafter and before such reduction went into effect the same was suspended by all of the fire insurance companies doing business in Missouri upon their filing a petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held and the referee found against the state and held that such reduction was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter upon appeal to the Supreme Court of Missouri the reduction so made was in every way sustained and the action of the Insurance Department upheld; thereafter by certiorari the case was taken to the Supreme Court of the United States and after being fully briefed, argued and presented, that court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect.

Second, because a stipulation was entered into between all of such insurance companies and the Insurance Department of Missouri whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate, instead of such reduced rate, they would not appeal to any court for an injunction preventing such reduction order from going into effect; and would not assail the constitutionality of the Missouri Rating Act, and *and* [fol. 47] that pending such review such insurance companies would execute a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected if such reduction order was finally sustained by a court of

last resort, and would make restitution, that part of the stipulation being as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Atty. Gen'l, Attorneys for the Defendant."

Third, because the reduction order having been sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, it is the duty of such insurance companies to make restitution to such policyholders of every sum collected from them in excess of the reduced rate; that restitution has not been made and that such companies only put up bonds aggregating one million dollars and have retained more than twelve million dollars from policyholders in Missouri, which by law and stipulation they should be compelled to return.

[fol. 48] Fourth, because all of the issues in this cause were fully presented and litigated in the hearing aforesaid before the Supreme Court of Missouri and the Supreme Court of the United States, and are now res adjudicata and there is nothing left for plaintiffs and these other insurance companies to do but to make restitution.

Fifth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department on the 9th day of November, 1923, was cancelled and set aside by such Department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray an order of this court either dismissing this proceeding or staying same until plaintiffs and all other fire insurance companies affected by such reduction order have made full and complete restitution to each and every policyholder in Missouri of each and every sum collected in excess of such ten per cent reduction.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri,
Arthur M. Hyde, John T. Barker, Floyd E. Jacobs,
Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 49] In United States District Court

Motion to Dismiss or Stay Unless Bond is Filed—Filed April 18, 1928

Now at this date come the defendants and ask the court to dismiss or stay the temporary restraining order heretofore issued in this cause for the following reasons:

First, because on the 9th day of October, 1922, the Insurance Department of Missouri ordered a ten per cent reduction of insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15th, 1922 and thereafter and before such reduction went into effect the same was suspended

by all of the fire insurance companies doing business in Missouri upon their filing a petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held and the referee found against the State and held that such reduction was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter upon appeal to the Supreme Court of Missouri the reduction so made was in every way sustained and the action of the Insurance Department upheld, 315 Mo. 113; thereafter by certiorari the cause was taken to the Supreme Court of the United States and after being fully briefed, argued and presented, that court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect, 48 Sup. Ct. Rep. 174.

Second, because a stipulation was entered into between all of such insurance companies and the Insurance Department of Missouri whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate, instead of such reduced rate, they would not apply to any court for an injunction preventing such reduction order from going into effect; and would not assail the constitutionality of the Missouri Rating Act, and that pending such review such insurance companies would execute [fol. 50] a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected if such reduction order was finally sustained by a court of last resort, that part of the stipulation being as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause

in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the questions of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Atty. Gen'l, Attorneys for the Defendant."

Third, because the reduction order having been sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, it is the legal duty of such insurance companies to make restitution to such policyholders of every sum collected from them in excess of the reduced rate; that restitution has not been made and that such companies only put up bonds aggregating one million dollars and have retained more than twelve million dollars from policyholders in Missouri, which by law and [fol. 51] stipulation they should be compelled to return.

Fourth, because these insurance companies failed and refused to execute and file a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected in violation of their stipulation and the law, but only executed and filed a bond for one million dollars, although actually collecting and retaining money belonging to policyholders in Missouri in excess of twelve million dollars; that before these insurance companies be allowed to litigate these same matters with the State in this court they should be compelled to execute at this time a bond or bonds in excess of twelve million dollars agreeing to return to the policyholders of Missouri all sums collected in excess of the ten per cent reduction order in case this and other courts finally decide against them.

Fifth, because if these insurance companies do not make restitution or file a bond or bonds sufficient to protect such

policyholders there will be thousands of persons having claims against these companies involving the same questions, and exactly of a similar nature, and a great multiplicity of suits will arise and such policyholders will be denied any substantial relief; so that, in addition to executing and filing such bond or bonds for the benefit of such policyholders, these companies should at this time be required to file in this court the name of every policyholder from whom they have collected these excessive rates since such reduction order went into effect on the 9th day of November, 1922, and, in addition thereto, the total amount of premiums paid by every policyholder, together with the name of the company collecting such excess premiums, in order that such policyholders may receive their money back in case the insurance companies ultimately lose.

Sixth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department [fols. 52 & 53] on the 9th day of November, 1923, was cancelled and set aside by such department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray an order of this court either dismissing this proceeding or staying the same until plaintiffs, and all other fire insurance companies affected by such reduction order and having cases pending in this court, execute a bond or bonds sufficient in amount to return to all policyholders all excess premiums collected if such reduction order is finally sustained by this and other courts and, in addition thereto, that they file in this court the name of every policyholder from whom they have collected such excessive rates since the ten per cent reduction order went into effect on the 9th day of November, 1922, together with the amount of premium paid by each policyholder and the company to whom paid, and such other information as this court shall deem necessary in order that such policyholders may eventually receive back such excess premiums so paid by them.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri;
Arthur N. Hyde, John T. Barker, Floyd E. Jacobs,
Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 54] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed April 18, 1928

Now at this date come the defendants and ask the court to set aside the temporary restraining order heretofore issued without notice in this cause and to dismiss this proceeding for the following reasons:

First, because upon the face of plaintiffs' petition plaintiffs are not entitled to the relief asked for.

Second, because on October 9th, 1922, the Insurance Department of Missouri ordered a reduction of ten per cent of fire insurance rates in Missouri, effective November 15th, 1922, and thereafter this plaintiff and all other fire insurance companies doing business in the State filed a petition for review in the Circuit Court of Cole County, Missouri, and upon the appointment of a referee a full and complete trial and hearing upon the merits was held and the referee found the issues for the insurance companies and against the Insurance Department and ordered such reduction set aside. Thereafter such finding of the referee was sustained by the Circuit Court of Cole County, Missouri; thereafter on appeal to the Supreme Court of Missouri the finding of the referee and of the Circuit Court of Cole County was set aside and the reduction order was sustained in every particular, and the action of the Insurance Department in making such ten per cent reduction was approved and sustained, 315 Mo. 113; thereafter by certiorari the cause was taken to the Supreme Court of the United States and such court refused to disturb the judgment and finding of the Missouri Supreme Court and allowed same to remain in full force and effect. 48 Sup. Ct. Rep. 174.

Third, because plaintiffs and all other such insurance companies have had their day in court; have litigated this identical question now before the court and the matter is res adjudicata on each and every point now raised and cannot again be litigated by this honorable body.

[fol. 55] Fourth, because plaintiffs and these other insurance companies entered into a stipulation whereby in the event they were allowed to collect the full premium, and

not put into effect such reduction, they agreed that would not ask for an injunction in any court, and would not assail the constitutionality of the Missouri Rating Act, and that they are estopped to now ask for an injunction in this court. Such stipulation, in so far as pertinent, is as follows:

"That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

"That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

"That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney General; Merrill E. Otis, Asst. Attorney Gen'l, Attorneys for Defendants."

Fifth, because in this proceeding plaintiffs and all other fire insurance companies in Missouri are asking a review of the decision of the Supreme Court of Missouri and this [fol. 56] court is without jurisdiction to review the final decision of the Supreme Court of Missouri, particularly so where the Supreme Court of the United States refused to disturb such judgment and finding.

Sixth, because the fifteen per cent reduction order referred to by plaintiffs made by the Insurance Department on the 9th day of November, 1923, was cancelled and set aside by such Department on the 12th day of April, 1928, and is no longer in force and effect.

Wherefore defendants pray that the temporary restraining order heretofore issued be set aside and this proceeding dismissed with costs.

Respectfully submitted.

North Todd Gentry, Attorney General of Missouri; Arthur M. Hyde, John T. Barker, Floyd E. Jacobs, Attorneys for Defendants.

Duly sworn to by Floyd E. Jacobs. Jurat omitted in printing.

[fol. 57] IN UNITED STATES DISTRICT COURT

STIPULATION TO TRANSFER TO WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI—Filed April 25, 1928

In accordance with Section 119 of Chapter 4 of Title 28 of United States Code, it is hereby stipulated and agreed by and between the parties in each of the above causes that each of said causes may be forthwith transferred to the United States District Court for the Western Division of the Western District of Missouri, and that an order may be forthwith made accordingly.

Robert J. Folonie, John S. Leahy, Ashley Cockrill, William S. Hogsett, Solicitors for Plaintiff in Each of Above Causes. North Todd Gentry, Arthur M. Hyde, Floyd E. Jacobs, John T. Barker, Solicitors for Defendants in Each of Above Causes.

[fol. 58] IN UNITED STATES DISTRICT COURT

ORDER TO TRANSFER TO WESTERN DIVISION OF WESTERN DISTRICT OF MISSOURI—Filed April 25, 1928

Now on this 25th day of April, 1928, in each of the above causes come the parties and file their stipulation agreeing

that each of said causes may forthwith be transferred to the Western Division of the Western District of Missouri.

Now, therefore, it is hereby ordered that each cause above named be and the same is hereby transferred to the United States District Court for the Western Division of the Western District of Missouri.

Albert L. Reeves, Judge.

[fols. 59 & 60] In United States District Court

Order Substituting Parties Defendant—Filed April 13, 1929

On suggestion of counsel and by consent of all parties in open court, Joseph B. Thompson, successor in office of Ben C. Hyde, Superintendent of Insurance, and Stratton Shartel, successor in office of North Todd Gentry, Attorney General, are substituted as defendants in each of the above actions for Ben C. Hyde and North Todd Gentry, in their designated official capacities, without prejudice to the rights of any party or change in the present status of any of the above cases.

Entered this 13th day of April, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fols. 61 & 62] In United States District Court

Order Denying Application for Temporary Injunction—Filed April 13, 1929

It is ordered and decreed that

1. To obviate the necessity of cumbering the records with a separately signed order in each of the above cases, this order is made to apply and be in each of such cases with the same effect as though separately made in each individual case.

2. The restraining orders now in force are so continued until and including May 15, 1929.

3. The application for a temporary injunction be denied and such injunction denied, without prejudice to any plaintiff to renew such application upon showing that it has repaid the excess of ten per centum collected on premiums for fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the date of the renewal of such application.

Entered April 13, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fol. 63] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 26, 1929

To the Honorable Kimbrough Stone, Circuit Judge; Honorable Albert L. Reeves, District Judge; Honorable Franklin Kennamer, District Judge:

The above named National Fire Insurance Company of Hartford, feeling aggrieved by the order of the court denying, after notice and hearing, an interlocutory injunction prayed by plaintiff in the above entitled cause, rendered and entered in said cause on the 13th day of April, A. D. 1929, does hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree is so based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said court in such cases made and provided.

[fol. 64] And your petitioner further prays that the proper order relating to the required security to be required of it be made.

National Fire Insurance Company of Hartford, by Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Its Solicitors.

Appeal pursuant to above petition allowed upon giving bond as required by law in the sum of Five Hundred dol-

lars and bond being now presented with satisfactory surety in the amount so directed such bond is hereby approved and ordered filed.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fol. 65] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 26, 1929

Comes now National Fire Insurance Company of Hartford, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the order made by this honorable court on the 13th day of April, 1929, denying the application of the plaintiff for an interlocutory injunction:

I

The United States District Court for the Western Division of the Western District of Missouri erred in overruling and denying the application of the plaintiff for an interlocutory injunction.

II

Said District Court erred in imposing terms and conditions for hearing and considering said application of the plaintiff which are unlawful, oppressive, and in particular, in imposing as a condition for consideration and renewal [fol. 66] of said application a showing that the plaintiff has repaid the excess of ten per centum collected on premiums for fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the date of the renewal of such application.

III

That the said District Court erred in that, in its opinion and in its said order, it has affixed and adopted a date as respects which a supposed duty of repayment is incumbent

upon the plaintiff, as of November 15, 1922, whereas there is no warrant for the court to adopt and affix any date as respects repayment or restitution, if any, prior to February 1, 1928.

IV

That the District Court erred in giving consideration upon such application for interlocutory injunction to matters not proper to be considered in such interlocutory application but which matters ought to have been reserved to the final hearing of said cause, and in particular as respects the supposed stipulation mentioned in the court's opinion and the compliance or non-compliance of the parties therewith, whether or not the Superintendent proceeded pursuant thereto, and the binding force and effect and mutual character thereof.

V

That the District Court erred in weighing and undertaking to determine the scope, nature and extent of review proceedings in the state courts and the effect and application of the stipulation thereto, upon bare allegations in affidavits, which the court ought properly to have reserved for disposition only on the final hearing of the cause.

[fol. 67]

VI

That the District Court erred in seeking to apply the doctrine of estoppel as against the plaintiff upon an issue not presented by any pleadings of the defendants and upon a matter of affirmative defense not presented in any pleading by defendants and the detail whereof ought to have been reserved for determination upon final hearing.

VII

That the District Court erred in coming to conclusions against the plaintiff upon the questions of want of consideration and lack of mutuality in the stipulation, whereas it was shown upon the hearing that irreparable injury would result to the plaintiff if interlocutory injunction was not granted, and whereas the balance of injury as against

the plaintiff would be much greater upon a denial of interlocutory injunction than any possible damage which might result to the defendants if the same were granted.

VIII

That the District Court erred in construing the said stipulation as applicable to the case at bar and not confined to former proceedings not here involved and in so doing came to conclusions upon matters upon inadequate knowledge of the facts which ought to have been reserved for consideration upon final hearing.

IX

That the District Court erred in applying the principle that plaintiff was barred by the doctrine that it came into a court of equity with unclean hands, whereas such matters were in no wise established upon the evidence nor was [fol. 68] shown as to warrant the court in denying the application of the plaintiff for an interlocutory injunction.

X

The District Court erred in ruling that if repayments be made by the plaintiff and no interlocutory injunction be granted that although "it is probable that such recovery would be impossible or at any rate highly improbable," namely recovery from policy holders to whom rebates might be paid, in the absence of an interlocutory injunction, that nevertheless the court held "but such result is no reason for granting the injunctions."

XI

The District Court erred in rejecting the claims of the plaintiff that Section 6283, Revised Statutes of Missouri, 1919, as construed by the Supreme Court of Missouri, under the admitted allegations of the Bill of Complaint, is an unconstitutional invasion of the rights of the plaintiff in the particulars alleged in the Bill of Complaint.

XII

The District Court erred in declining and refusing to hold the rate order of October 9, 1922, complained of under

the admitted allegations of the Bill of Complaint to be an unconstitutional invasion of the rights of the plaintiff as such constitutional invasions are alleged and set forth in the Bill of Complaint.

XIII

The District Court erred in holding that earned premiums, incurred losses and incurred expenses form an improper measurement of profit or loss and erred in adopting [fol. 69] and approving the basis of premiums received less losses and expenses paid.

XIV

The District Court erred in holding that it was not an invasion of the constitutional rights of plaintiff in that the Superintendent adopted an arbitrary and unreasonable method of affixing his rate change, and in particular in his use of the basis of premiums received and losses and expenses paid and in that he took into account the earnings of the plaintiff and its competitors from investments in affixing and making an order of reduction of rates on underwriting.

Wherefore appellant prays that said order of April 13, 1929, denying the application of the plaintiff for an interlocutory injunction be reversed and that said District Court for the Western Division of the Western District of Missouri be directed to enter an order reversing its decision upon such application and to grant an interlocutory injunction according to the prayer of the application therefor.

Robert J. Folonie, William S. Hogsett, John L. Leahy, Ashley Cockrill, Solicitors for Appellant.

[fol. 70] In United States District Court

Order Allowing Appeal—Filed April 26, 1929

On petition for appeal now filed by plaintiff, appearing by its solicitors, it is hereby ordered that an appeal to the Supreme Court of the United States from the order of

above named District Court denying, after notice and hearing, an interlocutory injunction prayed by plaintiff in said cause, be and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, and said bond being now presented with satisfactory surety in the amount so directed, is hereby approved by the court and ordered filed.

Dated April 26th, 1929.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

[fols. 71-73] Cost bond on appeal for $500.00, approved and filed April 26, 1929, omitted in printing.

[fol. 74] In United States District Court

Appellant's Præcipe for Record—Filed April 29, 1929

To Edwin R. Durham, clerk of the above court:

National Fire Insurance Company of Hartford, having filed its petition for an appeal, which has been allowed by the court, and the said appellant desiring that a record in said cause be transmitted to the Supreme Court of the United States, you are hereby requested to prepare and certify a transcript of the record in said cause, to be filed in the Supreme Court of the United States, and to incorporate into said transcript the following portions of the record:

(1) The verified bill in equity.

(2) The temporary restraining order issued February 14, 1928.

(3) The bond required by said temporary restraining order and given by plaintiff.

(4) The order of February 20, 1928, continuing temporary restraining order in force until hearing and determination of application for interlocutory injunction.

[fol. 75] (5) Amendment to bill in equity filed March 29, 1928, and order of court permitting the filing of such amendment.

(6) Further amendment to bill in equity filed March 29, 1928, and the order of court permitting the filing of such amendment.

(7) Plaintiff's application for interlocutory injunction.

(8) All motions in writing filed in said cause by either party.

(9) The order of the court taking said application for interlocutory injunction under advisement after hearing and arguments.

(10) The opinion of the court filed on or about April 12, 1929.

(11) The addendum to said opinion filed on or about April 13, 1929.

(12) The order of April 13, 1929 substituting Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, as successor in office to Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, and substituting Stratton Shartel, Attorney General of the State of Missouri, as successor in office to North Todd Gentry, Attorney General of the State of Missouri.

(13) The order of April 13, 1929 ruling upon and denying plaintiff's application for interlocutory injunction.

(14) Petition for appeal.

[fols. 76 & 77] (15) Assignment of errors.

(16) Order allowing appeal, fixing amount of appeal bond and approving same.

(17) Appeal bond.

(18) Citation together with acceptance of service thereon by appellees.

(19) Statement of the evidence approved by the court and filed in said cause.

(20) All other orders appearing upon the record and not incorporated under the foregoing requisitions.

(21) This præcipe.

(22) The præcipe, if any, filed by appellees.

Robert J. Folonie, William F. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

April 29, 1929.

Service of a copy of this præcipe acknowledged this date. Floyd E. Jacobs, John T. Barker, Solicitors for Appellees.

[fol. 78] In United States District Court

Before Honorable Kimbrough Stone, Circuit Judge; Honorable Albert L. Reeves, District Judge; Honorable Franklin Kennamer, District Judge

Statement of Evidence—Filed May 10, 1929

This matter coming on to be heard upon the application of the plaintiff for an interlocutory injunction, on the 20th day of April, A. D. 1928, there appeared for the plaintiff Messrs. Robert J. Folonie, William S. Hogsett, John S. Leahy and Ashley Cockrill, Solicitors for Plaintiff, and for the defendants Messrs. North Todd Gentry, John T. Barker and Floyd E. Jacobs, Solicitors for Defendants, thereupon evidence was produced as follows:

"Mr. Hogsett: In addition to the verified bills we desire to file affidavits in support of the bill."

Thereupon there was offered by the plaintiff and received in evidence the affidavit of Charles R. Street as Plaintiff's Exhibit 1, which, with formal parts thereof omitted, is in words and figures, as follows:

[fol. 79] Plaintiff's Exhibit 1

"Affidavit

State of Illinois,
County of Cook, ss:

Charles R. Street, being duly sworn, upon his oath says: I am Vice-President of the Great American Insurance Company and Vice-President of American Alliance Insurance Company, both of which are fire insurance companies doing a general business of insurance against fire, windstorm and all lines generally conducted by companies of that kind. I have held executive offices with fire insurance companies for many years and have been engaged in such business for about forty years past. I am familiar with

the practice of insurance companies during that period, not only the companies with which I have been associated, but also the general practice of companies engaged in the business of fire insurance.

As far back my personal experience goes (and for many years before that, according to my general knowledge of the business), fire insurance companies doing business in the United States have universally made their calculations for their own purposes and information, and in stating the results of their operations in the various states, as respects profit or loss derived on their business of underwriting or insurance during any specified period, upon the basis of earned premiums as income and incurred losses and incurred expenses as outgo. (The term "insurance" and the term "underwriting" are exact equivalents and are so understood in the business, and the operation of the business of insurance as conducted in Missouri and elsewhere is styled "underwriting.")

[fol. 80] During all my experience of more than forty years the ascertainment of a balance, as between written premiums (sometimes called "premiums received") and paid losses and expenses has been styled "trade balance", and such calculation is never used for the purpose of ascertaining profit or loss for a given period of time. It is generally recognized by those engaged in the business of fire insurance, that such trade balance when ascertained does not disclose a profit or loss and is inaccurately and misleadingly used if the balance so remaining is called or treated as a profit or loss.

The terms herein employed are properly defined as the same are used and employed by all persons engaged in or connected with such business, as follows:

"Written premiums" during a period of time are the premiums stipulated in all the policies issued during such period, no matter how far into the future such policies extend.

"Earned premiums" as respects the policies of a given company for a specified period of time, is that part of the premiums of all policies in force during any part of such period as pays for insurance during such period. The premium on a policy partly within and partly without of the period under calculation is prorated, and a pro rata of

the premium is taken into account, in the proportion that such part of the policy term within the period bears to the whole term of the policy.

"Unearned premium" is that part of the premiums stipulated in policies in force during the term under calculation which pays for indemnity after the term under [fol. 81] calculation, namely, which pays for insurance for the future.

"Incurred losses" respecting a period of time are those losses from perils insured against which happen, and liability for which becomes fixed, during that period of time upon risks insured against.

"Incurred expenses" are expenses for which liability becomes fixed during the period under calculation.

"Paid losses" are the losses which are paid during a given period, although they may not arise upon policies in force during the period under calculation, and although liability may have previously become fixed, and not taking into account any losses for which liability is fixed if they happen to be unpaid.

"Paid expenses" are those expenses which are paid during the period in question, although the liability for them may have become fixed during a precedent period; not taking into account expenses for which liability exists but which have not in fact been paid.

In my judgment (and it is the judgment universally held by those engaged in the business of fire insurance and who have studied the subject) the experience of a fire insurance company to ascertain its profit or loss for a period of time cannot be soundly computed by adoption of any basis except that of earned premiums as income, and incurred losses and expenses as outgo. The reasons supporting such judgment are as follows:

(a) Such is the uniform custom of companies and company accountants for their own purposes of profit and loss calculations, and is universally recognized and employed as the sound method of calculation by companies in their [fol. 82] own affairs.

(b) Such basis is adopted in the Annual Statement blanks prescribed by the Insurance Departments of every state in the United States, which (at page 10 of Missouri

Annual Statement blanks) require the companies to set forth their insurance or underwriting experience for an elapsed year upon the basis of earned premiums, incurred losses and incurred expenses. This is the only profit and loss calculation prescribed in such report, showing the profit or loss of each company in its nationwide business for the elapsed year.

(c) The basis of earned premiums, incurred losses and expenses is prescribed by the Congress of the United States as the method to be used in ascertaining and reporting the profits of insurance companies upon which they shall pay income taxes; and the definition of the Act of Congress is in accord with the practice of the companies and the standard prescribed in the Annual Statement blanks prepared by the Insurance Department of Missouri and other states.

(d) The statutes of many states, including Missouri, expressly prohibit an insurance company from paying dividends out of the unearned portion of its premiums. The company is permitted to declare and pay dividends only out of surplus profits. Surplus profits are arrived at by offsetting the company's liabilities against its assets; and among the liabilities so offset are included its unearned [fol. 83] premiums. It is, in my judgment, inherently illogical to say that unearned premiums are profits, or shall be treated as accrued income, when by statute the company is forbidden to distribute such unearned premiums among its stockholders. It is a contradiction in terms to denominate as a profit that which cannot be distributed as a profit.

(e) After two years of consideration of this subject by experts representing the fire insurance companies on the one hand through a committee and the insurance commissioners of the various states of the United States through a committee representing the public, the insurance Commissioners Convention (which is a voluntary association to which the insurance commissioners of every state in the Union, including Missouri belong) adopted the basis of earned premiums and incurred losses and expenses as the proper and uniform method to be used in calculating profit or loss. The report of the Committee of the National Con-

vention of Insurance Commissioners was approved and adopted by the Convention on December 7, 1921. Among other things that report states:

'Underwriting profit (or loss) is arrived at by deducting from earned premiums all incurred loss and incurred expenses.'

'No part of the so-called banking profit (or loss) should be considered in arriving at the underwriting profit (or loss).'

In such report, it was further found that:

'A reasonable underwriting profit is 5% plus 3% for conflagrations.'

The foregoing conclusions were adopted by the Conven- [fol. 84] tion accompanied by the statement that it was 'highly important that this body clearly express its convictions as to what constitutes a reasonable underwriting profit and a proper and uniform method of arriving at the same.'

(f) If the matter were one of first impression as to what is a sound method of ascertaining profit or loss, the earned and incurred method would, in my judgment, necessarily be adopted, because it is a sound method of accountancy. It is not in principle any different from principles of accountancy applied in other lines of business. If money be paid in advance for service or goods or indemnity, and a part of that which is to be delivered has in fact been delivered at a specified date, and a portion is to be delivered in the future, sound accountancy and common honesty requires that the money so paid in advance be not all treated as income when a liability for performance remains for the future. The amount or value of the future liability remaining must be set up for the unperformed or undelivered portion of the contract, otherwise the statement made is a false one. These principles specially apply to a policy of insurance, because, in every policy issued by fire insurance companies throughout the United States, there is uniformly a provision that the policy may be cancelled at any time, either by the insurance company or the person insured, and it is palpably illogical to treat as profit or accrued [fol. 85] income that part of the premium which has not been earned, and which may never become earned, but which the

company may be compelled to return to the policy holder on cancellation.

A sound method of apportioning that part of the premium applicable to a past period and assigning another part to a future period, where performance is to be made through a given period of time, is to take that portion of time which has elapsed and ascertain its proportion to the whole period of time stipulated in the insurance contract. That proportion of the stipulated premium represents the amount earned at a specified time. The proportion which is prepaid or advanced, paying for future service or indemnity, is the unearned portion. The proportion as between earned and unearned premium is prorated properly and soundly according to the proportion of the policy term within and without the test period under calculation.

In no other way can the experience of any given period of time, such as a five year period, be segregated. If the profit or loss of a company for a given year or a given number of years is to be ascertained, no other method will disclose or even fairly indicate the profit or loss for the period.

(g) There is an element of marked error in resorting to the "received and paid" method, namely, by taking into account written premiums (sometimes loosely styled premiums received) as income and paid losses and expenses as outgo. The fire insurance companies doing business in [fol. 86] Missouri universally write a considerable volume of policies for three and five years, as well as for one year. This is common practice throughout the United States. If all the written premiums be taken into account for a one year period ending December 31, 1927, then on all three year policies written in 1927 there would still be indemnity to be furnished during the years 1928, 1929 and 1930.

For five year policies it would extend into 1931 and 1932. In taking the experience for one year, taking into account premiums written only during that year, there would be taken into account as income, premiums paying for insurance extending over five years of time against which would be set up losses and expenses paid during 1927.

(h) The only way of setting up operating income for a period of say, five years, against outgo of the same five years, is to set up the losses and expenses which happened on the policies in force, and for which liability became fixed,

during those five years, and to take into account only the earned premiums, that is, the premiums which pay for insurance during that period. Under the earned method of calculation, policies written during a prior period than that under calculation, are taken into account insofar as they extend into the period under calculation.

It is my opinion and it is the concensus of opinion among persons engaged in the business of fire insurance, who have given any consideration to the subject, that a reasonable standard of profit measurement is 10% upon the earned [fol. 87] premiums. This standard, which is generally accepted in the insurance field, has been limited by the Insurance Commissioners Convention to 8%, of which 5% is styled a profit and 3% an allowance for conflagration losses. Whichever method may be the more advisable, it is important to understand that such measure is in no way a guaranteed profit, nor necessarily any profit at all. Its employment merely means that applying such measure to the past experience there is no unreasonable profit to be anticipated in the future. The business of fire insurance is an extremely hazardous one and if, upon a given level of rates a serious loss occurs, there is no means of recouping such loss.

There is such sharp competition with mutual insurance companies, reciprocal insurance companies, Lloyds and other individual insurers and other stock companies writing similar lines of insurance, and such competition among stock fire insurance companies themselves, that no likelihood exists, in my judgment, for exorbitant charges, even if no regulation of any kind existed. The companies in general are doing business at a very narrow margin, so narrow that any unexpected and unusual loss in any state will operate to deprive the companies there of any profit over any period of time.

The State of Missouri has been a notoriously unprofitable state for fire insurance companies for more than fifteen years past, and the companies with which I am associated in an official capacity, have had an unprofitable experience in that state during such period of time.

It is true that a large number of the old and well established fire insurance companies have corporate earnings enabling them to pay reasonable dividends to their stock-

[fol. 88] holders, even though they may not make anything on their business of insurance in Missouri. It is to be borne in mind that such profit-making companies, almost without exception, are those companies which have been engaged in business for fifty or a hundred years and have accumulated very large reserves, which they have retained for investment instead of distributing the same to the stockholders, as they might have done, and do business in other states and countries where they make a profit. These profits may have been derived in some part from insurance, and in some part from compounding their capital and surplus, investing and re-investing the earnings upon it, so that in many cases the surplus has been developed into a figure in excess of the original contributions to stockholders. These earnings so derived from investments and insurance conducted elsewhere are distrinct from and not involved in the business of insurance in the State of Missouri, nor have they been, during any of the past ten or fifteen years and more, derived in any part from Missouri business, except in case of a few companies unusually fortunate or restricting their business to specified classes.

It is neither practical nor possible to make any profit calculation upon the basis of capital, as is done in case of railroads and public utility companies, because the business is fundamentally different in its nature. Any calculation of profit and a reasonable return must be upon the basis of a reasonable charge for the service and indemnity rendered, which, as I have already said, should be upon the basis of 10% upon earned premiums; and it may readily happen that when so calculated, by reason of the hazards of the business, no profit whatever will be derived from the business when and as conducted pursuant to such basis. [fol. 89] The reason that no profit in any amount necessarily results from application of such basis of calculation is because the risks assumed are in general one hundred times the premium, and in some cases, even more, so it can readily occur that losses may and often do happen that defeat all effort at prior calculation. No calculation upon the basis of capital used or useful in the business is possible, for many obvious reasons, among others:

Many companies are engaged in the business, which companies are foreign to the United States and organized under the laws of other countries. Such companies make a deposit

of $200,000 in the state of New York and receive remittances from their home office or send remittances to them as their business proceeds. American companies may have capital of from $200,000 to many millions of dollars. Some do business in only a few states, others in all states in the Union, and still others worldwide. Two companies, doing an equal volume of business in the state of Missouri, may in one case have a capital of $200,000 and in another case of $10,000,000. As neither company has its capital invested in the state, in the sense that utilities and railroads do, it is apparent that no theory of allocation of the capital is practical or possible. The observations herein made as to a proper basis of profit computation are probably not highly material upon the hearing now being had, because the companies here suing have made no profit at all or a purely nominal one which the rate orders would entirely destroy.

Stock fire insurance companies doing business in Missouri each and all have two distinct activities in which they are [fol. 90] engaged,—first, that of insurance or underwriting as operated in Missouri, and second, that of investment of their monies conducted at their home offices. The latter department of activity is sometimes referred to as their Banking or Investment Department. In the case of the larger stock fire insurance companies, these Departments are carried on with complete independence, having one or more executive officers in charge of investments with a separate staff of employes. The investment department is charged with rents, salaries of employes and executive salaries independent of the operation of the insurance department of the business. In the case of smaller companies, the activities are also carried on independently, except that the President of the company will in such cases usually buy and sell securities under direction of the Board of Directors, and the time spent by him on such features of the business is a comparatively inconsequential part of his time. The expense is kept strictly separate in case of such companies also. The directors who take the responsibility on such matters customarily serve without compensation or for a nominal compensation, and are men of business experience in different lines of industry, who lend their experience to the investment problems of the company.

Fire insurance companies are required by law and by the nature of the business to keep their capital out of the busi-

ness of insurance and keep it as a fund in the nature of a guarantee fund. The moment it is employed in the business of insurance the company is insolvent. The capital must be kept intact and not used for salaries, rents, loss payments, etc. If even a dollar of it is so used, the company is impaired and insolvent and prevented from doing business. In this respect fire insurance differs from most [fol. 91] lines of business. In some other kinds of business the capital is employed in the business and invested in tangible assets and not required by law to be kept out of the business. The free or distributable surplus of fire insurance companies, commonly called "surplus" is a sum in excess of capital and in excess of all liabilities, such as reserves for unearned premiums, loss payments, etc. This fund is also free from the burdens of the business and not mingled with the operations of the business of insurance. It may be borrowed to set up reserves or make up losses in the business, and when so used, it is taken out of and ceases to be free surplus.

It is therefore just to say that both capital and free surplus are entirely distinct from the operations of the business of insurance; and if the companies should cease doing business of insurance, they would have their entire capital and free surplus available to lend out at interest, without taking any of the hazards of the business of insurance. The relation of these funds to the business of insurance is, in substance, that of a guarantee fund, which guarantees that resources exist to which resort may be had if necessary, to meet unfortunate losses.

The investment of capital and surplus of all the plaintiff companies in the present suits (except as to one company, which is incorporated in Missouri,) in every case is done at the home offices of the companies in other states, and not in the state of Missouri.

For a great many years the fire insurance companies have paid to their St. Louis agents a scale of commissions approximately five per cent in excess of the scale in force in the remainder of the state. This custom of paying these so-called "excess commissions" to St. Louis agents has been the result of an insistance on the part of said agents [fol. 92] that they render greater service than agents elsewhere in the state and that their expense of operation is

greater in that city than the expense of agents in other smaller cities and towns of the state. The St. Louis agents have consistently demanded a higher scale of commission on account of this increased expense of operation, and on account of the increased service rendered by such agents to the companies. The practice of paying the excess commissions is not one that the companies voluntarily adopted, but one which was forced upon stock fire insurance companies by competition of other competing kinds of insurers and by competition with one another. While fire insurance companies in Missouri write insurance at the same rates, there is very keen competition between them in the obtaining of business and in securing desirable agency connections. The excess commissions have been actually incurred and paid by the companies, because in the judgment of their respective officers and agents the same were a necessary expense, and because of the long years during which said commissions have been paid, and in view of the competitive conditions above referred to it is impractical to destroy existing relations with agents by any company which desires to remain in business in Missouri.

(Signed) Charles R. Street.

(Jurat.)"

Thereupon there was offered by the plaintiff and received in evidence the affidavit of F. P. Hamilton as Plaintiff's Exhibit 2, which, with formal parts thereof omitted, is in words and figures, as follows:

[fol. 93] PLAINTIFF'S EXHIBIT 2

"Affidavit

STATE OF ILLINOIS,
County of Cook, ss:

F. P. Hamilton, being duly sworn, upon his oath says: I am Vice-President of the Queen Insurance Company, and have been engaged in the business of fire insurance as an employe and executive officer for over thirty years past. I have read the affidavit of Charles R. Street, to be presented upon motion for an interlocutory injunction; and state that what he says therein respecting the earned and

incurred basis of profit calculation and respecting commissions and the conduct of the business of insurance is true. The considerations by him stated have been true since I engaged in this business; and I can only add, for the information of the court, that by the statutes of Missouri, a reserve is required to be set up in the statements made by stock fire insurance companies to the State of Missouri on a pro rata basis for the unearned premium to be set up as a liability.

I am in accord with the principles of such statute and believe that it is a sound business practice, regardless of statute, to set up a pro rata proportion of premiums to cover liability for unexpired terms of policies; and that it is likewise sound to set up as outgo incurred losses and incurred expenses when calculating profit or loss and unsound to consider only paid losses and paid expenses for a given period, but which occurred during a former period and which have no relation to policies in force during the period under computation.

I am familiar with the agency expenses incurred and paid [fol. 94] to agents by companies doing business in the state of Missouri for many years past. The general rates of commission exacted by agents in the state of Missouri, outside of St. Louis, have for many years been 15%, 20% and 25%, depending upon the character of the business and differing as between companies within such limits, dependent upon the difficulties of the companies in securing proper agency connections through which to secure their business. These matters are matters of contract between the companies and agents. In general, the companies have been compelled to pay about 5% more in St. Louis for securing a like kind of business, than they have paid elsewhere in the state. This situation has arisen out of the claim of agents that they have higher expense for rent, clerk hire; that they employ services of engineers in inspecting risks, and have other expense, and more intricate and difficult risks requiring greater expenditure of time and money to ascertain their character, than do the agents elsewhere in the state. I have known in recent years of many efforts by various companies to reduce their commission arrangements with agents, but it has proven impractical to materially reduce commission rates below those which now exist. If any company should reduce its commission rates,

the agent representing it will either terminate his contract with that company or secure representation of other companies, or divert business to other companies represented in his agency, with the consequence that the company attempting to write at less than the commission rates paid by its competitors invariably loses its better business in such agencies where it undertakes to do so and has presented to it the poorest business, or none.

The agents maintain associations which support their efforts to keep commission rates unimpaired, and I am of [fol. 95] the opinion that considering the conditions existing in the business in respect to competition with other types of insurers, and competition existing between stock companies, one against the other, and having reasonable regard for the rights of the public, of the agents and the insurance companies, that while lower commission rates would be desirable from the standpoint of the companies, that considering the rights of others and considering the practical effects of competition, no marked change is at this time possible.

The normal expense of a well managed and established company doing business in the state varies in its relation to earned premiums, dependent on many factors. A company in the state for less than five years will almost necessarily have a larger expense ratio, although its absolute expense may not be much greater. This in no way indicates that the company is badly managed or that its expenses are abnormal, but such higher expense ratio arises out of the fact that until it has been established for five years or more, the accretions to its premiums derived from prior writings are necessarily small, comparatively, and its losses and expenses become liabilities practically contemporaneous with their occurrence. Owing to the fact that its distribution will not be as wide as that of an older and larger company, (the amount at risk being well over one hundred times the premium charge,) the happening of a comparatively few major losses may wipe out the entire premium earned during a given period, whereas similar losses in a company having a wider distribution would cause a smaller ratio of losses.

It is for these reasons that smaller companies of those newsly in the state will show greater unevenness in experi-

[fol. 96] ence than older companies, having a wider distribution of their business.

My attention has been called to the fact that the Superintendent of Missouri, in his rate order, took into account a sum as "interest on unearned premium." In my opinion, this is an unsound method of accountancy and "interest on unearned premium" should not be taken into account as income in setting up a profit and loss statement for rate-making purposes.

The basis of profit calculation adopted by the National Convention of Insurance Superintendents provides for a profit of 5% and an additional 3% for conflagration hazard. The standard by them adopted contemplates excluding anything but earned premiums as income. If any income of the company from invested assets were to be taken into account as a supposed underwriting income, then I would say the profit base ought to be changed and that least a 10% profit on earned premiums ought to be permitted. It is illogical, however, in my opinion, to take into account any sum as "interest on unearned premiums," and the reasons, which are generally recognized to be sound by those engaged in and acquainted with the business of insurance and so recognized by me, are as follows:

(a) Term policies (that is, policies for three and five-year periods) form a very substantial part of the business. Such policies are uniformly written by companies upon a basis of premium charge lower than upon annual policies and policies for a shorter period. By universal practice, three-year policies are written for two and one-half times an annual premium, and five-year policies are [fol. 97] written for four times an annual premium. An allowance is thus made to the policyholder for the prepayment which is fully compensatory for the use of the money. The allowance so made is a fair equivalent of interest upon the money prepaid and is allowed to the policyholder upon taking his policy. Policies for one year and less are treated as contemporaneous payments, and must practically be so considered because it is not practical, as a business matter, to make payments exactly contemporaneous with the rendition of service which is rendered day by day. The company uniformly extends credit to its agents, who remit their balances in the second month after policies are written and

sometimes not then. The companies are required to keep on hand a large amount of cash to meet loss and expense contingencies, which sums remain uninvested. In unprofitable states, like Missouri, where the income is insufficient to meet outgo, the companies are required to resort to their free surplus to pay losses and expenses, and the unearned premium reserve is made up, in considerable part, out of surplus and not out of premiums. Even in cases where business runs normally and profitably about 40% of unearned premiums are constantly furnished out of free surplus. This in time flows back and is in a state of daily flux. In a company actively engaged in underwriting, it has to lend to the reserve constantly to the extent of about 40% of the reserve.

(b) The policy contract between the insurance company and the policyholder provides for a prepayment of premium by the policyholder, with no provision for repayment [fol. 98] or allowance or return of anything to the policyholder, except in case of cancellation. Upon payment of the money by the policyholder, it becomes the money of the insurance company, subject to the furnishing of indemnity and contingency of cancellation.

(c) "Interest on unearned premium" is really a misnomer, and it is unsound, in my judgment, to give it consideration as income in a rate calculation. The unearned premium is not an amount existing as of a period of time but is a balance ascertainable as of a given date. Not only is it difficult, if not impossible, to compute, but the term itself is a misleading one. When the policyholder pays the agreed premium, he contracts to pay this sum and to receive an equivalent indemnity for it, thereby he is divested of the money entirely and it becomes completely the money of the insurance company, subject only to a condition subsequent, namely, cancellation.

Eliminating cancellation from present consideration as not bearing upon the immediate inquiry, the money is definitely transferred to the insurance company and the insured definitely gives it up, whereby it completely changes hands and is the money of the insurance company, in which the policyholder has no interest. What the policyholder is entitled to from that time forward is not money, but indemnity.

By the statutes of Missouri and other states, the insurance companies are required to set up a reserve in their accounts, to insure their ability to render the indemnity provided for. This is not required to be segregated from other [fol. 99] assets, but merely a method of bookkeeping adopted to disclose the amount of premium applicable to future liability. As the several policies progress to their maturity, there is either under a given policy no loss at all, in which event the money remains with the insurance company; or there is a cancellation, in which event the unearned or returned premium is paid to the policyholder; or there is a total loss, upon occurrence of which a sum, varying usually from one hundred to two hundred times the amount of the premium, is paid to the policyholder.

The division of premiums into earned and unearned premiums is necessary, for purposes of accountancy, to set up the portion of the premium applicable to an elapsed and unelapsed period. In other words, to segregate the premiums into parts, dependent upon the date to which any given calculation is to be made. This has not the slightest bearing, however, upon the title to the money, which is in the insurance company from the time the policy is written, subject only to a condition subsequent—cancellation. The unearned premiums is as much the money of the company as the earned premium. The unearned premium is set up in every statement as a liability, in the same way that capital is set up as a liability, and the remainder, after setting up capital and unearned premiums and like liabilities, represents surplus. The fact that it is so set up as a liability does not imply that it is a liability to policyholders, for it is set up in exactly the same way that capital and surplus are. The sum is so set up as a sound method of ac- [fol. 100] countancy, to value the service which has been contracted for and not yet rendered but which has been paid for, which must be set up as a liability item in any just account, to show the ultimate balance remaining as a distributable surplus.

(d) The unearned premiums are not segregated as a separate and distinct fund, although they may be stated at any given date and each cancellation of any policy and each happening of a total loss and the mere lapse of a day

of time will change the unearned premium figure from what it was immediately before. It is a constantly shifting amount, varying from day to day. The happening of a total loss on an insured property terminates all liability under the policy, and therefore terminates all unearned premium on that particular policy. Likewise, a cancellation and return of premium on a specified policy terminates the setting up of any unearned premium on it. The unearned premium so shifting from day to day is in fact set up out of general surplus. Every fire insurance company must keep some cash on hand for expenses for current losses and for contingencies. It additionally has uninvested assets in agency balances representing a large sum of money, so that constantly there is a very large sum of money showing as assets on the company's books which are entirely uninvested, and some of which are not in hand except theoretically. Of its invested assets a considerable part must be kept in securities of the highest grade of marketability, bearing small interest rates so as to be immediately avail-[fol. 101] able in case of contingency. The unearned premiums represent a most important part of the business, a constantly fluctuating liability, and for which the company must always be prepared to return to its policyholders. I think it is fair to state therefore that the average rate of income which the company's investments produce would be a rate much greater than any income justly attributable to unearned premium.

I am of opinion that a basis of 10% on earned premiums is a fair basis of underwriting profit and that if the basis of 8%, declared by the Insurance Commissioners Convention, were to be adopted and an item of interest on unearned premiums were to be additionally considered as if it were underwriting income, that it would reduce the basis to so low a figure that its adoption nationwide and its enforcement would drive great numbers of well managed companies out of business. I recognize the fact that there are quite a number of companies which have been in existence for 75 or 100 years which have accumulated large sums, which they have refrained from distributing to stockholders, who could do their underwriting business at a loss for a considerable period of years and still remain solvent. This is not true, however, of the majority of companies, who are compelled to look to their business of insurance as

a source of income, and, in my judgment, are entitled to do so if they are to remain in such business.

(Signed) F. P. Hamilton.

(Jurat.)"

[fol. 102] Thereupon there was offered by the plaintiff and received in evidence the affidavit of Paul W. Terry as Plaintiff's Exhibit 3, which, with formal parts thereof omitted, is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 3

"Affidavit

STATE OF MISSOURI,
County of Jackson, ss:

Paul W. Terry, of lawful age, being first duly sworn upon his oath says:

I am now, and for more than eight years last past have been, a member of the firm of Waterworth & Terry, who operate and are managers of the Missouri Inspection Bureau. The managers operating the Missouri Inspection Bureau, as agents for the stock fire insurance companies doing business in Missouri, for thirteen years last past have maintained, and do now maintain, in the State of Missouri the public rating record required by Section 8270 R. S. Mo. 1919. As manager of the Missouri Inspection Bureau I have knowledge of the several rate reduction orders made by Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, on January 5, 1922, October 9, 1922 and November 9, 1923.

The first of these rate reduction orders was made on January 5, 1922, and was in words and figures as follows to wit:

'Insurance Department, State of Missouri, City of Jefferson

Ben C. Hyde, Superintendent; Joshua Barbee, Deputy; R. E. Daly, Actuary; Wilbur F. Marine, Jr., Chief Clerk

Missouri Inspection Bureau, Waterworth & Terry, Managers, Pierce Bldg., St. Louis, Missouri:

[fol. 103] Section 6283, Revised Statutes of Missouri 1919, provides that the Superintendent of Insurance, upon his

own motion, is empowered to investigate the necessity for a reduction in rates charged by the stock companies doing a fire, lightning, hail and windstorm insurance business in the State of Missouri. I have made such investigation and from such investigation and the underwriting experience reports of the companies filed with the Insurance Department of Missouri, it appears to me that the earnings in the State of Missouri of the stock fire insurance companies for the five years next preceding such investigation show that there has been an aggregate profit in excess of what is reasonable.

The Missouri Inspection Bureau is the rating and actuarial bureau through which the said stock companies maintain their public rating record as required by the laws of the State of Missouri. Therefore, you are notified as the representative of the stock fire, lightning, hail and windstorm insurance companies listed with or subscribers at the Missouri Inspection Bureau, a list of which is hereto attached, and through the Missouri Inspection Bureau I desire to notify said companies, that I have this day ordered a reduction of fifteen per cent in the rates now authorized by the Missouri Inspection Bureau and charged by the aforesaid companies on the fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will leave said companies a reasonable profit after giving proper reasonable consideration to the conflagration liability within and without the state.

The aforesaid reduction ordered shall take effect and be in operation on and after the 15th day of February, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meet the approval of the Superintendent of Insurance, the Superintendent will designate the class or classes to which the reduction shall apply.

Ben C. Hyde, Superintendent of Insurance.

Dated at Jefferson City, Missouri, this 5th day of January, 1922.'

This rate reduction order was made by the Superintendent without any notice whatever to any of the stock

fire insurance companies doing business in Missouri and without any notice to the Missouri Inspection Bureau, and without any hearing, or opportunity to be heard, accorded to any of said companies or said Bureau. The first notice of said order received by any of said companies or by said Bureau was after the order was made and promulgated by the Superintendent. There was no opportunity to any of [fol. 104] said companies or to said Bureau to offer evidence or make any showing before the Superintendent as to the result of the business in Missouri of said companies, or any of them, preceding the making of said order.

Thereafter on February 4, 1922 one hundred forty stock fire insurance companies filed a suit to enjoin said rate reduction order, and a temporary restraining order was issued by the Cole County Circuit Court accordingly.

Thereafter on February 14, 1922 the plaintiffs in that suit entered into a stipulation with the Superintendent, as follows:

'In the Circuit Court of Cole County, Missouri, November Term, 1921

ÆTNA INSURANCE COMPANY et al., Plaintiffs,

vs.

BEN C. HYDE, Superintendent of the Insurance Department of the State of Missouri, Defendant

Stipulation

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reducing the rates of insurance charged by all stock fire insurance companies doing business in the State of Missouri on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restraining order heretofore entered therein is hereby dis-

the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

[fol. 105] 2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessity for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(a) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(b) What is a reasonable profit on the business written in this State;

(c) What per cent of premiums received is allowed for the conflagration hazard;

(d) What is the basis upon which earnings in Missouri should be determined and ascertained;

(e) What is the ratio of expenses incurred to premiums earned in this State during said period;

(f) What is the ratio of losses incurred to premiums earned in this State during said period;

(g) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force [fol. 106] prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney-General, Merrill E. Otis, Assistant Attorney-General, Attorneys for the Defendant.'

In accordance with the stipulation the 15 per cent order of January 5, 1922, was revoked by the Superintendent and the injunction suit was dismissed. Thereafter a hearing was had, and on October 9, 1922, the Superintendent made the 10 per cent reduction order, which is one of the two orders involved in the present suits.

Of the plaintiffs in the present suits now pending in the United States District Court for the Central Division of the Western District of Missouri, the following were not parties to the aforesaid injunction suit or to the stipulation filed therein:

London & Provincial Marine & General Insurance Co., Ltd.
Chicago Fire & Marine Insurance Co.
National Security Fire Insurance Co.
Superior Fire Insurance Co.
Potomac Insurance Company of the District of Columbia.
East & West Insurance Co.
The Eagle Fire Company of New York.
Northwestern Fire & Marine Insurance Co.
Philadelphia Fire & Marine Insurance Co.
The Carolina Insurance Co.
Columbia Fire Insurance Co.
Merchants Insurance Co.
The Travelers Fire Insurance Co.
Twin City Fire Insurance Co.
Delaware Insurance Co.
[fol. 107] Eureka-Security Fire & Marine Insurance Co.
Federal Union Insurance Co.
Lumbermen's Insurance Co.
Merchants' Fire Insurance Co.
National Reserve Insurance Co.
Presidential Fire & Marine Insurance Co.
Sentinel Fire Insurance Co.
The World Fire & Marine Insurance Co.
First American Fire Insurance Co.
General Insurance Company of America.
Harmonia Fire Insurance Co.
Mercury Insurance Co.
New York Underwriters Insurance Co.
Guaranty Fire Insurance Co. of Providence.
New York Fire Insurance Co.
American Equitable Assurance Co.
Western Fire Insurance Co.
The Preferred Risk Fire Insurance Co.

The Superintendent did not, either in his rate reduction order of October 9, 1922 or otherwise, make the findings specified in subdivisions (a) to (g) of paragraph 2 of said stipulation above quoted.

In the Superintendent's 10 per cent rate reduction order, of October 9, 1922, the Superintendent stated:

'You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now

charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability both within and without the state.

The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the superintendent will designate the class or classes to which the reduction shall apply.'

The companies did not, within thirty days from the order of October 9, 1922, or at any other time, submit any class or classes for the approval of the Superintendent of Insurance; and the Superintendent delayed from October 9, 1922 until February 1, 1928 before he attempted to desig- [fol. 108] nate the classes to which said 10 per cent reduction in rates should apply. On February 1, 1928 the Superintendent for the first time undertook to designate the classes to which said reduction should apply, such designation being as follows:

February 1, 1928.

Missouri Inspection Bureau, Waterworth & Terry, Managers, Pierce Building, St. Louis, Missouri.

GENTLEMEN: Whereas, on October 9th, 1922, I, Ben C. Hyde, under the authority granted me as Superintendent of Insurance by Section 6283, Revised Statutes of Missouri for 1919, did order a reduction of ten per cent on all fire, lightning, hail or windstorm insurance rates effective in the State of Missouri on and after November 15th, 1922, and whereas the Supreme Court of Missouri on May 21st, 1925, upheld this action, I hereby require that on February 1st, 1928, this reduction be applied to the existing fire, lightning, hail or windstorm rates for all classifications of such risks in this state.

Yours very truly, Ben C. Hyde, Superintendent of Insurance, by J. A. Rathbun, Deputy Superintendent.

At no time prior to February 1, 1928 did the Missouri Inspection Bureau or any of the stock fire insurance companies doing business in Missouri have any notice whatever as to the class or classes to which the Superintendent's 10 per cent reduction in rates should apply.

Risks which are insured against loss by fire, lightning, hail and windstorm in Missouri are, for the purpose of rate making, divided into so-called "classes." The word 'classes', as here used, and as universally used and understood in the business of making insurance rates, does not have reference to the description of hazards insured against, such as fire, lightning, hail and windstorm, but [fol. 109] means the classifications of property for the application of rates thereto, as the same are classified by those engaged in the business of insurance. The Superintendent has since 1915 required stock fire insurance companies to report to him annually their experience in Missouri, and has required the companies in making such report to use a blank denominated 'report of underwriting experience by classes.' This blank requires a report by the companies of their experience, separately stated, on various classes of property, including dwellings and their outbuildings, fraternity and sorority houses, flats, tenements and apartments, mercantile buildings, mercantile contents, churches and chapels, other public buildings and contents cereal, grist, feed, rice and flour mills, cotton compresses and warehouses, cotton gins, farm risks, grain elevators and warehouses, lumber yards, metal workers, mining property, oil risks, railway risks, tobacco warehouses, wharf risks, wood workers, miscellaneous manufacturing risks, etc. Many of these classes are subdivided into fireproof, brick and frame classifications. The classes so set out in the 'report of underwriting experience by classes' indicate the nature of 'classes' as that word is used in the business of insurance rate making.

At no time prior to February 1, 1928 could any insurance company or insured have known what the rate of premium would be upon any given peice of insurable property, under the Superintendent's reduction order of October 9, 1922.

The Superintendent might conceivably have applied the entire rate reduction upon tornado rates in such an amount as would accomplish a reduction of 10 per cent upon fire,

lightning, hail and windstorm; or he might have applied it all on fireproof risks, or on coal mines, or on any other class which it pleased him to select. It was impossible, in [fol. 110] advance of the Superintendent's designation of classes on February 1, 1928, to know what the actual reduced rate (under the reduction order of October 9, 1922) would be on any particular risk. It turned out finally on February 1, 1928, that the Superintendent directed that the reduction be applied equally upon all classifications of fire, lightning, hail and windstorm risks. But until the designation was actually made, neither the companies nor the insured property owners knew or could know how he would apply it.

(Signed) Paul W. Terry.

(Jurat.)"

Thereupon there was offered by the plaintiff and received in evidence the affidavit of Paul W. Terry as Plaintiff's Exhibit 4, which, with formal parts thereof omitted, is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 4

"Affidavit of Paul W. Terry

STATE OF MISSOURI,
County of Jackson, ss:

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says:

I am now, and for more than eight years last past have been, a member of the firm of Waterworth & Terry, who operate and are managers of the Missouri Inspection Bureau. The managers operating the Missouri Inspection Bureau, as agents for the stock fire insurance companies doing business in Missouri, for thirteen years last past have maintained, and do now maintain, in the State of Missouri, the public rating record required by Section 6270, [fol. 111] R. S. Mo. 1919. As manager of the Missouri Inspection Bureau I have knowledge of the income and outgo of stock fire insurance companies for various years including the years hereinafter mentioned.

The aggregate experience in Missouri of all of the one hundred fifty-five stock fire insurance companies, plaintiffs in the above suits, for the years 1922 to 1927 inclusive was as follows:

Income (Earned Premiums)	$139,972,636
Outgo (Incurred Losses and Expenses)	151,205,738
Loss	11,233,102

That said one hundred fifty-five companies include all of the stock fire insurance companies which were engaged in business in Missouri during said period, with the exception of four or five small companies, whose exact figures are not available. That the experience of said four or five companies, not included in the above tabulation, was a negligible percentage of the aggregate business of all the companies doing business in the state during said period and was insufficient in amount to materially effect the result of said tabulation.

(Signed) Paul W. Terry.

(Jurat)."

OFFER IN EVIDENCE

Thereupon the plaintiff offered in evidence and there was received in evidence Notice with Proof of Service, served five days before the hearing of application for injunction with proof of service upon the Governor of the State of Missouri and the Attorney General of the State of Missouri.

Thereupon the defendants offered in evidence an order of the Supreme Court of Missouri, of date April 9, 1928, as Defendants' Exhibit A, which, with formal parts omitted, is as follows:

[fol. 112] DEFENDANT'S EXHIBIT "A"

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1927

No. 26187

ÆTNA INSURANCE COMPANY et al., Respondents,

vs.

BEN C. HYDE, Superintendent of the Insurance Department of the State of Missouri, Appellant

Order

It is ordered that this court retain jurisdiction in this cause for the purpose of making any other orders or judgments in the future which to the court shall seem just and proper.

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true and correct copy of the order in the case of Ætna Insurance Company, et al., vs. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, as made by this court, April 9, 1928.

In Testimony Whereof I hereunto set my hand and affix the seal of the Supreme Court of Missouri at my office in the City of Jefferson, state aforesaid, this 19th day of April, 1928.

(Signed) J. D. Allen, Clerk of the Supreme Court of Missouri. (Seal.)"

OFFER IN EVIDENCE

Thereupon the defendants offered in evidence certain pages from Bill of Exceptions in review proceeding in the Supreme Court of Missouri, showing names of the parties to such proceeding, wherein appeared the name of National Fire Insurance Company of Hartford as one of the plaintiffs in said cause.

Thereupon WILLIAM S. HOGSETT, being duly sworn, testified orally, as follows:

Direct examination by Mr. Folonie:

"My name is William S. Hogsett. I am one of the counsel for plaintiff. I have examined the records of the Circuit Court of Cole County as respects the existence there of a mandate of the Supreme Court of Missouri in the case of Ætna Insurance Company, et al., vs. Hyde. I present certified copy of the mandate of the Supreme Court of the [fol. 113] United States in that case filed in the Missouri Supreme Court on February 3, 1928."

Said instrument was offered in evidence as Plaintiff's Exhibit 5, and omitting formal parts thereof is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 5

"UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Whereas lately, in the Supreme Court of the State of Missouri, before you, or some of you, in a cause between Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Appellant, and Ætna Insurance Company, Agricultural Insurance Company, Alliance Insurance Company of Philadelphia, et al., respondents, No. 26187, wherein the judgment of the said Supreme Court, entered in said cause on the 21st day of May, A. D. 1926, was in favor of the said appellant, Ben C. Hyde, Superintendent of the Insurance Department, etc., and against the said respondents; as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty seven,

the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the writ of certiorari in this cause be, and the same is hereby, dismissed with costs; and that the said appellant, Ben C. Hyde, Superintendent of the [fol. 114] Insurance Department, etc., recover against the said respondents for his costs herein expended and have execution therefor.

January 3, 1928.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Missouri, in order that such execution and proceedings may be had in said cause, in conformity with the judgment and decree of this above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the tenth day of February, in the year of our Lord one thousand nine hundred and twenty eight.

(Signed) Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by P. R. Stansbury, Deputy.

File No. 32168. Supreme Court of the United States, October Term, 1927. No. 112. Ætna Insurance Company, Agricultural Insurance Company, Alliance Insurance Company of Philadelphia, et al., vs. Ben C. Hyde, Superintendent of the Insurance Department of the State of Mis- [fol. 115] souri. Mandate. Filed February 13, 1928. J. D. Allen, Clerk Supreme Court."

Thereupon, on April 21, 1928, Guy M. Sone, produced as a witness for plaintiffs and being first duly sworn, testified:

Direct examination by Mr. Hogsett:

"My name is Guy Sone. I am Deputy Circuit Clerk of Cole County, Missouri. I here produce the mandate of the Supreme Court of Missouri filed in the Circuit Court

of Cole County in the case of Ætna Insurance Company, et al., versus Ben C. Hyde, Superintendent, et al., cause Number 4566. The instrument now produced is the original mandate from the Supreme Court of Missouri taken from the files of my office."

Thereupon said mandate was read in evidence and omitting formal parts thereof is as follows:

EXHIBIT IN EVIDENCE

"Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County, rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be, and the same is hereby dismissed and that said appellant recover against the said respondents his costs and charges herein expended and have execution therefor. (Opinion Filed.)

STATE OF MISSOURI, set:

I, J. D. Allen, Clerk of the Supreme Court of the state of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, [fol. 116] entered of record at the April Term thereof, 1926, and on the 21st day of May, 1926, in the above entitled cause.

Given under by hand and seal of said court at the City of Jefferson this 7th day of March, 1928.

(Signed) J. D. Allen, Clerk. (Seal.)"

Endorsed with the following file mark: "Filed Mar. 9, 1928. Richard R. Nacy, Circuit Clerk."

Cross-examination by Mr. Barker:

"The date of filing the mandate was March 9, 1928. On receiving the mandate it was marked "Filed" and recorded in the records of the court."

Which was all the evidence produced on the afore and foregoing hearing.

Thereupon the cause was duly taken under consideration, oral arguments then and there made and time given the parties for submission of briefs.

The above and foregoing Statement of the Evidence is presented by the plaintiff and the same lodged in the clerk's office for examination of the defendants and approval of the court of said statements requested by the plaintiff and upon being approved by the court that the same may be filed in the clerk's office and become a part of the record for the purposes of the appeal.

Robert J. Folonie, William J. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Plaintiff.

April 29, 1929.

Service of a copy of above Statement of evidence acknowledged this date.

Floyd E. Jacobs, John T. Barker, Solicitors for Appellees.

May 6, 1929.

This Statement is hereby approved.

John T. Barker, Floyd E. Jacobs, Solicitors for Appellees.

[fol. 117] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

The above Statement of Evidence having been lodged in the office of the clerk before the time of filing of præcipe by the plaintiff and due notice of the lodgment thereof together with nomination of time and place of presentation of same for approval having been given more than ten days before this date and all objections and proposed amendments thereto having been considered, said statement as above set forth is hereby certified to be a true, complete and properly prepared Statement of the Evidence and is approved by the court, and the clerk directed to file the same

and to make the same a part of the record for the purposes of appeal.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. F. E. Kennamer, District Judge.

Dated May 10, 1929.

[fol. 118] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Reeves and Kennamer, District Judges

MEMORANDUM OPINION—Filed April 13, 1929

STONE, Circuit Judge, delivered the opinion of the court:

Section 6283, R. S. Mo. 1919, authorizes the Superintendent of Insurance of that State to reduce the rates of stock fire insurance companies, whenever the earnings of such companies, for five years, show "an aggregate profit therein in excess of what is reasonable," so as to limit the "aggregate collections by insurance companies in this state to not more than a reasonable profit." Section 6284 provides a review of such orders "by a proper action in the courts" wherein the "entire matter shall be treated and determined de novo" and pending which the rates fixed in such orders shall be in force.

Acting under Section 6283, the Superintendent made three orders reducing rates. The first was a reduction of 15% and was made January 5, 1922. Shortly thereafter, the companies filed a joint equitable action in the State court against the Superintendent and a temporary restraining order was entered preventing enforcement of the order. A few days later, a stipulation was entered into between the parties to that suit, one result of which was rescission of the order by the Superintendent. Although the above order is not involved in the present actions, the above stipulation and matters thereafter arising therefrom present one of the issues in these actions and will be discussed hereinafter.

The second order, made October 9, 1922, required a reduction of 10% in rates. A month later, all of the com-

panies affected thereby joined in a review proceeding under Section 6284 in the proper State trial court. That court set aside the order as unreasonable and confiscatory. On appeal to the State Supreme Court, the decree of the trial court was reversed (315 Mo. 113). The Supreme Court of the United States granted a writ of certiorari (273 U. S. 681).

[fol. 119] After hearing, the Supreme Court dismissed the writ on the sole ground that no federal question was presented (275 U. S. 440).

While the above action for review was in course, the Superintendent, on November 9, 1923, made a third order which required a reduction of 15% in rates.

Shortly after the above decision by the Supreme Court of the United States, 155 companies filed separate actions in this court against the Superintendent and the Attorney General of the State for the purpose of enjoining the enforcement of the two orders made on October 9, 1922, and on November 9, 1923, respectively. Shortly thereafter, and before hearing in this court, the Superintendent rescinded the order of November 9, 1923. The bills attack, in a similar manner, the order of November 9, 1923, and Section 6283 as then amended (Mo. Laws 1923, p. 234) but the fact that this order was rescinded before hearing and the fact that the 10% order was made before amendment of Section 6283 eliminate the 1923 order and the section as amended from our consideration. Taking the situation at the time of the hearing, our concern is with the validity of section 6283, unamended, and with the validity and the force of the order of October 9, 1922. As each of these cases involves the same issues, they were heard at one time, upon the applications for a temporary injunction, by a statutory court of three judges.

This hearing was upon the verified bills, motions to dismiss the bills, motions to dismiss the bills or to stay proceedings until complete restitution has been made to every policyholder in Missouri of any amount collected "in excess of such ten per cent reduction," affidavits and other testimony at the hearing.

Generally stated, the position of each complainant is that Section 6283, as construed (315 Mo. 113) and as applied to it, in the light of its separate experience, is unreason-

able and confiscatory and, therefore, the order reducing rates by 10% is void as to it. The attack of complainants may be placed under three general headings: first, the State has no power to regulate insurance rates; second, the regulation prescribed in Section 6283 is violative of Constitutional rights and, therefore, that section is void; third, the method pursued by the Superintendent in determining the basic facts for his action is unconstitutional and, therefore, the order based thereon is void.

In their motions to dismiss and motions to dismiss or to compel restitution, defendants urge three matters as a bar to our consideration of the above contentions of complainants. These are as follows: first, that complainants are estopped to file or prosecute these bills by the terms of the above stipulation; second, that the matters presented in these bills are all foreclosed by the decision in the review proceedings under Section 6283—such decision being res adjudicata thereof; third, that without the restitution to policyholders demanded in the motions filed herein, the complainants come into equity with unclean hands and should be denied all relief or, at least, denied relief until such restitution be made.

The Stipulation

Shortly after the reduction order of January 5, 1922, had been made, the companies affected thereby joined in an action in the State Circuit (trial) court in Cole County, Missouri. This action was an ordinary injunction proceeding to prevent enforcement of that order. A restraining order was issued therein. At that stage of the controversy, the parties agreed upon a course of action which was embodied in a written stipulation. This is the stipulation urged by the present defendants as a bar to each and all [fol. 120] of the present complainants. Of the present complainants, thirty-three were not parties to the stipulation (complainants' Exhibit 3, printed copy p. 7) and, therefore are not bound thereby. Our further discussion of the effect of the stipulation is applicable to, and only to, the complainants which were parties thereto. The stipulation is as follows:

"In the Circuit Court of Cole County, Missouri, November Term, 1921

Ætna Insurance Company et al., Plaintiffs,

vs.

Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Defendant

Stipulation

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reducing the rates of insurance charged by all stock fire insurance companies doing busines in the State of Missouri on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restaining order heretofore entered therein is hereby dissolved, and all liability under the bond given pursuant to the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessity for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other

evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(a) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(b) What is a reasonable profit on the business written in this State;

(c) What per cent of premiums received is allowed for the conflagration hazard;

[fol. 121] (d) What is the basis upon which earnings in Missouri should be determined and ascertained;

(e) What is the ratio of expenses incurred to premiums earned in this State during said period;

(f) What is the ratio of losses incurred to premiums earned in this State during said period;

(g) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial de novo in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall

give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of preminums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie, Seymour Edgerton, John S. Leahy, Attorneys for the Plaintiffs. Jesse W. Barrett, Attorney-General; Merrill E. Otis, Assistant Attorney-General, Attorneys for the Defendant."

This stipulation dealt with the then situation and also looked to the future. There were four main purposes of the stimulation.

The first purpose was to dispose of the reduction order of January 5, 1922, and of the injunction suit against that order. This was covered by provisions reciting that the Superintendent had that day "withdrawn and revoked" the reduction order of January 5, 1922; that the existing injunction suit against that order "is hereby dismissed and all liability upon the bond given by the complainants therein discharged."

The second purpose was to provide for conditions attaching to a subsequent hearing as to future reductions and any order entered thereon. This was covered by provisions that the Superintendent should not call a hearing for rate reduction purposes before March 15, 1922; that when such hearing might be called, the companies would appear and produce such evidence as required and as they might desire to present; that such evidence should include the "experience of said companies in the State of Missouri [fol. 122] for the year 1921," to be considered by the Superintendent along with the other evidence introduced before him; that the Superintendent should make written findings on "all essential, material and competent matters of fact disclosed by the evidence," including seven specified matters. As to any order of reduction entered upon

such hearing it was provided that it should "apply to all classes alike."

The third purpose was to prescribe the method and only method which should be employed by the companies to test such future reduction order, with a statement of limitations and rights in connection therewith. This was covered by provisions that such test should be by a statutory review under Section 6284, before the Circuit Court of Cole County; that no injunction should be sought therein nor should the validity of Sections 6283 and 6284 or the "legality" of the hearing be raised; that until final determination of such test suit, the companies should collect existing rates, giving bond "to refund to the assured any excess of premiums collected by them" if the order "be finally sustained."

The fourth purpose was to define what should be done by the companies if the reduction order be finally sustained. This was covered by a provision requiring bond to be given, in the above test suit, "to refund to the assured any excess of premiums collected by them" (the companies).

What occurred after the stipulation was executed was as follows: The first purpose was fully performed by both parties—the reduction order of January 5, 1922, was withdrawn; the injunction suit was dismissed and the bond given therein satisfied and discharged.

The second purpose was substantially carried out. After March 15, 1922, such hearing was had and the order of reduction (October 9, 1922), now in question, was entered by the Superintendent. Complainants' only claim that the Superintendent failed fully to follow the stipulation is that he failed to make any of the seven specific findings required there. Rather strangely, only a small portion of the order (the part ordering the reduction) is before us, either in the pleadings or the proof. When the review of this order (under Section 6284) was before the Supreme Court of Missouri, the opinion therein sets forth some of the findings of the Superintendent and epitomizes others. In the epitome, it is said "The order recites further that, notwithstanding his request, the insurance companies refused to furnish the information agreed upon" in the stipulation (315 Mo. 113, 122; also see opinion in same case in Supreme Court of the United States, 275 U. S. 440, 444). The portion of the order quoted in that opinion shows that some

of the specific findings required by the stipulation were made by the Superintendent (315 Mo. 113, 122-123). The only evidence properly before us is a single sentence in the affidavit of Paul W. Terry to the effect that the Superintendent "did not * * * make the findings specified in sub-divisions (a) to (g) of paragraph 2 of said stipulation." Because of the character and importance of this controversy and because of our knowledge (from the State Supreme Court opinion) that this statement in the affidavit is not, in all respects, accurate and because that opinion reveals the possible existence of a legal excuse for not making such findings (that the companies refused information), we would be justified in reopening the case for further testimony as to this alleged failure of the Superintendent in relation to these findings required by the stipulation. This, however, is unnecessary because the undisputed evidence is that such deficiency, if it existed, was waived by the companies. This waiver is shown by their conduct after the action, or lack thereof, of the Superintendent was fully known to them. When that knowledge was theirs, they had the right, if the Superintendent had, without legal excuse, failed to comply with the stipulation, to repudiate the stipulation and freely take such action as they desired. [fol. 123] They elected to proceed in accordance with the stipulation. They not only initiated the statutory review proceedings, but omitted any attack upon the validity of the statute or the legality of the proceeding before the Superintendent; gave the bond stipulated and collected the premiums stipulated. Their course through the state courts followed the stipulation. Therefore, we must regard the matter before the Superintendent as having been fully performed, in a legal sense, by the Superintendent in accord with the stipulation because the only alleged failure upon his part has been waived.

The third above purpose of the stipulation was fully carried out by both parties.

The fourth purpose became active because the final determination was against the companies. The State Supreme Court upheld the order of reduction and the Supreme Court of the United States declined to interfere. The judgment of the State Supreme Court has become final. Nothing remains to be done by anyone, under the stipulation, except for the companies to repay the 10% excess of premiums

collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment.

This being the situation at the time these complaints were filed, at the hearing and at present, are the defendants justified in asking that this Court grant no relief until complainants have performed their remaining part under the stipulation and repaid these excess premiums collected?

Complainants attack the stipulation from several angles. They say it is without consideration; that it lacks mutuality; that the companies were under duress; that it was violated by the Superintendent; that it has no application to the present suits; that it is invalid if it be construed to prevent bringing of the present suits; that the present suits are no violation of the stipulation because the attacks herein on the statutes are based upon the construction thereof by the State Supreme Court.

The contention as to lack of performance by the Superintendent has been disposed of above.

The argument as to lack of consideration is based, principally, upon the claim that the advantages given by the stipulation to the companies were legal rights thereof. They say the revocation of the reduction order of January 5, 1922, was no consideration because that order was a nullity as it had been made without notice or hearing; that the stipulation provision for a hearing before any future reduction order be made was no consideration because they had a constitutional right to a hearing; that the provision that future reduction order should be tested by the statutory review proceedings gave nothing as the statute accorded the right to such form of review; that the provision allowing, pending the review proceedings, collection of existing rates was no consideration because void as being beyond the power of the Superintendent—the statute requiring the reduced rates to be applicable during the review. It is not necessary to examine and determine each of these contentions. It is enough to say that the stipulation actually secured for the companies definite benefits all of which they received. They escaped litigation concerning the reduction order of January 5, 1922, with the expenses and hazards thereof. They secured a delay of a month (February 14, 1922, the date of the stipulation, until March 15, 1922) of any action by the Superintendent

during which they received the existing premium rates. They secured the procedure as to hearing and review which, apparently, was satisfactory to them and which included collection and retention, pending the review, of the excess rates. They have had the benefit of that excess collection and have it yet. To say that positive and decided benefits did not flow to the companies through the stipulation does [fol. 124] not accord with the facts. That the companies might have successfully litigated the order of January 5, 1922, or the present order has no effect upon the validity of the stipulation now fully performed by the other party. An obvious purpose of the stipulation was to determine and agree upon a definite course of action which would avoid litigation as to the first order and confine litigation as to the second one. The claim that the Superintendent had no power to agree to collection and retention of the excess pending the stipulated review is beside the mark because the companies have received the entire benefit of that provision which is fully executed. We have no doubt as to the sufficiency of the consideration.

The contention as to lack of mutuality is not much pressed. It is coupled and presented with the claim of lack of consideration. We can see no basis for any contention that there were not mutual obligations all of which have been met or waived except the final one of repayment by the companies.

As to duress—no facts are here to support such a contention. The stipulation was fully and freely entered into by all parties.

The remaining attacks upon the stipulation are that it has no application to the present actions; that if so applicable it is invalid and that these actions are not violations of the stipulation because based upon the invalidity of the statutes as construed by the State court in the review proceedings. The obvious intent of the parties was to confine attack upon a future reduction order to a stipulated procedure. That procedure was authorized (Section 6284). The companies could and did waive resort to other forms of attack open to them. The companies recognized this meaning of the stipulation and litigated, in accordance with the stipulation, for more than five years and through every possible court. They stipulated that if that litigation were unsuccessful they would repay the excess premiums collected under the

stipulation. They made no reservations concerning the law which might be announced by any court in the course of that litigation. Even if they could now begin an entirely new and different attack upon the order of reduction such condition would not meet the claim of defendants that they are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out. We think this position of defendants is well taken. The underlying principle in the equitable rule of "unclean hands" is that a court of conscience will not grant relief to one who, at the time, is acting inequitably in connection with the subject matter of the controversy. We express no opinion thereon but it may be that the stipulation was not intended to or that it could not prevent the complainants bringing separate actions to attack the reduction order, either through invalidity of the statutes upon which power to make the order must rest or through defects inhering in the particular order, but the facts remain that the stipulation required repayment of the excess collections if a particular stipulated proceeding resulted adversely to these complainants; that such result occurred; that every benefit to complainants from the stipulation has been received by them; that those benefits are very substantial and that they refuse to refund. Unless they do so, they will rob the other parties to the stipulation of every possible benefit therefrom, although such parties have fully performed the stipulation upon their part. Such action by the complainants is highly unconscionable and should not be permitted by a court of equity. It is analogous to that of parties to a contract where the complainants seek to act upon a rescission of the contract while retaining substantial fruits thereof. There, a court of equity will compel a restoration of the status quo before examining the rights of the parties. Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit [fol. 125] thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before.

It is argued that to require this repayment would result in injustice to these companies if it should be determined

later that the order was confiscatory as to them or any of them, because it would be impossible ever to recover back the repayments thus made to the policyholders. It is probable that such recovery would be impossible or, at any rate, highly improbable. But such result is no reason for granting the injunctions. If that is the result, it is one which they have voluntarily brought upon themselves. It does not excuse them nor justify this Court in disregarding a basic prerequisite to the exercise of equitable powers. The so-called "rule of convenience" which leads courts of equity to preserve a status until the rights of the parties can be determined has no application here. The situation here is that equity will not move to protect the rights of a party until that party has placed itself in a position where it can ask a court of equity for such protection. As to each of these complainants who were parties to the stipulation the prayer for temporary injunction should be denied without prejudice to renewal upon a showing of the above refund by the particular complainant seeking such renewal.

The above view as to the effect of the stipulation makes it unnecessary, at this time, to determine the other matters raised by defendants, insofar as such matters relate to these complainants which were parties to the stipulation.

Companies not Parties to Stipulation or State Review Proceedings

The remainder of this opinion, except the "Conclusion," will deal with the complainants who were not parties to the stipulation and, therefore, not subject to the above disposition. Also, these companies were not parties to the statutory review proceedings. Hence, they are not subject to any of the issues of stipulation, restitution or res adjudicata presented in the motions filed by defendants. The present complaints of such companies are to be determined upon the issues presented in those complaints and the evidence introduced.

Counsel for complainants urge ten points in their brief supporting these applications for temporary injunction. Some of these can be readily determined. Points I and II are that "This Court has Jurisdiction" and that "Plaintiff has property in Missouri within the protection of the

Fourteenth Amendment." Point IX is that "The instant proceeding is the type of proceeding specifically pointed out by the Supreme Court as the appropriate one." We have no doubt that this Court has jurisdiction and that this is a proper proceeding in which to determine the validity of this reduction order and to afford such equitable relief as is prayed and is required by the facts in order to protect any rights of each complainant under the Fourteenth Amendment. Point X is that "Irreparable injury to plaintiff will result unless an interlocutory injunction is granted." Insofar as this point may be regarded as urging the propriety of resort to an injunction proceeding to protect the rights complained of as having been violated, the point is well taken. As to whether such injunction should issue will, of course, depend upon the rights of the parties as hereinafter determined.

Points VI, VII and VIII have to do with the attack upon the reduction order of November 9, 1923. As that order was revoked before this hearing and is no longer effective, those points may be disregarded.

[fol. 126] Point V has to do with the order of October 9, 1922, and is an attack upon the validity of Section 6283. It is stated thus: "Sec. 6283, R. S. Mo. 1919, is unconstitutional."

Section 6283, R. S. Mo. 1919, contains the entire authority under which the Superintendent of Insurance of that State made the order of reduction of October 9, 1922, which is involved in these actions. It is as follows:

"Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions.—The Superintendent of Insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the Superintendent of Insurance shall be applied, subject to his approval: Provided, that the Su-

perintendent of Insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state" (Laws 1915, p. 313).

This section was amended in 1923 but, as this amendment became effective after this order was made, we are not concerned with that amendment because the power to make this order must be measured by the section as it stood when the order was made (Ætna Insurance Company v. Hyde, 315 Mo. 113, 127).

This section has been under consideration of the Supreme Court of the State and of the United States (Ætna Insurance Company v. Hyde, 315 Mo. 113; same title, 275 U. S. 440) The State Supreme Court has construed it in certain respects as follows: that "profits" mean aggregate profits (p. 128); that in calculating "profits," investment earnings are not to be taken as income (pp. 129, 138), unearned premiums (pp. 132-137, 152) and interest on unearned premiums (pp. 137-141) are to be taken as income and losses and expenses paid are to be taken instead of those incurred (pp. 134, 154); that elements affecting the probable future effect of the order may be considered (pp. 142-145). The discussion of other matters in that opinion—such as excessive commissions, income tax, war tax and fraudulent losses—seem expressions as to facts rather than any construction of the statute. The Supreme Court of the United States construed Section 6283 as requiring "consideration en masse of the 'result of the earnings' of all the companies, and, upon finding an excessive 'aggregate' profit, it becomes the duty of the Superintendent to limit the 'aggregate collections' to not more than a reasonable profit" (275 U. S. at 446). That court further says: "Neither of the Sections 6283 or 6284 authorized a determination of the reasonableness of rates when applied to the business of any company" (p. 448).

Under Point V, these complainants urge several grounds of invalidity of the statute as thus construed. Some of

these may be shortly eliminated. Rather half-heartedly, the challenge of the power of the state to regulate such rates is made. That power is sustained in German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

The contention that the statute is invalid in applying only to "stock fire insurance companies" is not sound. The [fol. 127] power of the state to make reasonable classifications for purposes of police regulation is beyond dispute. The only question which can arise is as to the reasonableness of the classification made. The classification here is between fire and other forms of insurance and between stock and mutual companies. Each of the bases is reasonable and natural. Fire insurance is a distinct legal and business classification. The distinction between stock and mutual insurance companies has been approved in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 418, and some reasons therefor- are well expressed by Judge Ragland in Ætna Ins. Co. v. Hyde, 315 Mo. 113, 150.

The contention that the section is invalid because it delegates the administration of legislative power but wholly fails to prescribe any standard, rule or guide for the exercise thereof is unsound. The wording of the statute and the construction thereof by the Supreme Court of the Nation and of the State have outlined a guide for the action of the Superintendent.

The contention is, also, that the statute is invalid in not requiring notice and a hearing prior to making reduction orders. We need not inquire whether such notice and hearing is a legal requirement because neither the wording nor any proceeding thereunder prevents such notice and hearing and both were accorded in this instance.

There remain five grounds of attack, under Point V, upon the section to be examined. The first is that the "aggregate" method required by the section is invalid because such method takes no account of the particular circumstances and facts governing the profit of the particular complainant company, but is based upon aggregate profits determined by aggregate expenses and income of all such companies in the State. The section clearly requires (315 Mo. 113, 128) and permits (275 U. S. 440, 446) only the aggregate method of ascertaining profits for the purpose of making a reduction order. Is this invalid because it takes no account of the situation as to each or a particular individual

company nor of the effect thereon of the order made? We think not. The distinction to be kept in mind is between the legislative and the judicial power. The legislature may use any reasonable method to carry out its purposes. The judiciary may then examine the results of such action upon anyone affected thereby and determine the validity of such results as to that party—such results may be judicially found to be just as to some and unjust as to others. Whether the legislative method is reasonable depends upon conditions surrounding the purpose of the legislative action. Here, the legislature desired to regulate insurance rates. Well known busines- conditions suggested the advisability of a common rate for all companies upon the same classes of risks. The legislative problem was, in a practical sense, not an individual company matter, but a composite or general or aggregate matter to be determined from general facts and circumstances rather than from individual experiences. This method of legislative procedure is old and has never, ipso facto, been judicially condemned. For years, the State legislatures enacted laws broadly fixing railroad charges at certain flat rates. The method of securing constitutional protection therefrom was not by striking down the law as a whole, but by according to each individual carrier the right to test the effect of the law upon it—if the result was confiscation, the law was invalid as to that particular company, if it was not confiscatory, it was valid as to the particular company. Such seems to be the view of the Supreme Court as to this section (275 U. S. 440, 447). Our conclusion is that the section is not invalid because it uses the aggregate method but that any company affected by a reduction order thereunder has the right to test the validity of the order when applied to it on the ground that the effect thereof is confiscatory as to it and, if such contention be sustained, to be relieved therefrom.

[fol. 128] The four remaining grounds of attack, under Point V, are based upon contentions urged to be true, even though the aggregate method be valid. One of these is really a matter not affecting the validity of the section, but pertinent to an investigation of facts thereunder. That is the claim that, in determining expenses, deduction may be made for excess commissions paid agents in St. Louis. The statute requires ascertainment of "aggregate profits" for a

five-year period for the purpose of determining a future reasonable aggregate profit. If it were an original proposition, we would say that the only requirement of the section was that the aggregate method should be employed. What matters should be considered as bearing on income or expenditure in ascertaining such "aggregate profit" would, we should think, be left to the Superintendent within the bounds of reason and law—that is, that any and all pertinent facts might be considered by him and no others. The Supreme Court of Missouri has determined that certain matters are required by the section and we accept that as a construction of the section, but it has not so determined as to this particular matter of excess commissions. Therefore, we think the only place thereof is in an examination of the facts as to the effect of the order on the particular complainant.

Another contention is that the section is invalid because the State Supreme Court construed it as requiring the deduction from expenses of federal war taxes on Missouri premiums. The only respect in which the State court can be said to have construed the section in that particular is that it determined that the Superintendent was authorized thereunder to consider future conditions which would affect any rate he might order. Any rate established by the Superintendent would be for future application. Any circumstances known or probable affecting that future would be pertinent to the inquiry (McCardle v. Indianapolis Co., 272 U. S. 400, 408-9, 412; S. W. Tel. Co. v. Pub. Serv. Comm., 262 U. S. 276, 288; Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 691). In the McCardle case, Mr. Justice Butler said: "In every confiscation case, the future as well as the present must be regarded" (p. 408). We think the State court was right in such construction of the statute. It is admitted that the repeal of the law levying this tax would prevent its being an expense during the period of the order, although it had been such during the prior five-year test period under examination by the Superintendent.

Two contentions under Point V remain. They are, that the section as construed, is invalid, first in that underwriting profit or loss shall be on the basis of premiums paid less losses and expenses paid, instead of on the basis of premiums "earned" less losses and expenses incurred and,

second, in that interest earnings on "unearned" premiums are included as income. As attacks upon the validity of the section, these contentions have no place in the present proceedings. Whether they would be in the statutory review proceedings under Section 6284 is not here pertinent. The present proceedings are separate complaints by certain individual companies affected by the order. The prime question before us in each of these actions is—is the order confiscatory in effect upon the particular complainant? We are concerned only with the effect of such result upon the particular complainant. If the effect of the reduction order is confiscation as to a particular complainant, the order is void as to it. If that effect is not confiscatory, the complainant is without remedy so long as the Superintendent has acted within the power conferred by the section as construed by the highest court of the State. There is no contention here that he has acted outside of such power.

In determining the matter of confiscation in the present suits, we are not bound nor affected by the statute. We are guided solely by the rules of evidence in a federal trial court in the determination of the crucial fact of confiscation vel [fol. 129] non. When a right under the Federal Constitution is in question before a federal court, it applies its own rules of evidence in the investigation of facts material to such issue. It is in that connection alone that the propriety of the paid premiums, loss and expenses or the earned premiums and incurred loss and expenses methods are to be considered and the propriety of treating interest earned on unearned premiums as income.

Our conclusion is that the statute as construed is valid in so far as these complainants can test that matter in these proceedings.

Complainants state contention IV as follows:

"It is an unconstitutional invasion of the rights of the plaintiff to base a rate reduction upon the experience of competitors of plaintiff without weighing its confiscatory effect upon the plaintiff individually."

Taking this contention as stated, it is unsound for reasons above given. No right of plaintiff is invaded by such a method per se unless it results in confiscation when applied to it. In fact, it is the result and not the method which

is important to plaintiff. Under the section, the Superintendent has power to limit the collections of each company to a reasonable amount and to do so through the medium of fixing rates. No company has a constitutional right to charge a rate which will produce more than a reasonable profit. Every company has a constitutional right to receive a reasonable profit. In its attempt to select a method of regulating such rates to produce only a reasonable profit, the State legislature has a wide choice. It is not required to treat each company separately upon its own facts. Nor is it required to consider the effect of its action upon each individual company. The only limitation is that its action must not be arbitrary to the harm of the companies. Such action is not arbitrary if it has a reasonable connection with the existing circumstances. Here, three of such circumstances are that there are a great many companies (making it impractical to consider each separately); that practical business considerations compel a similar rate for all companies (making it practical to prescribe a flat rate applicable to all and entirely impractical and, in a business sense, useless to prescribe for each company different rates dependent upon its particular experience) and that the National Constitution affords protection, through the courts, to any individual company as to which the flat rate might be confiscatory (thus furnishing relief in those instances where the flat rate might, in its application, be too low and leaving it in effect where not too low). The above circumstances would make reasonable the method of Section 6283 for determining a rate to produce a reasonable profit, as construed by the State Supreme Court.

Confiscation

The remaining contention (III) to be considered is that "The 10 per cent reduction order and the 15 per cent reduction order are each confiscatory as to each plaintiff." For reasons hereinbefore stated, we have no concern with the "15 per cent" order, which was the order of November 9, 1923, rescinded before the hearing in these actions.

Each of these complaints presents an attack upon the order of reduction because, it is claimed, the order is confiscatory as to the particular claimant. As so often happens in important rate controversies, the evidence as to this

matter of fact before us on these applications for temporary injunctions is meager, general and, in many respects, incomplete and unsatisfactory. It is largely made up of the verified bills and affidavits. The argument under point III of the brief is short and general. However, under Point V there are four matters urged which may be properly considered in connection, also with the question of confiscation because they deal with general matters applicable to all of [fol. 130] the cases and have direct bearing upon some of the facts and upon the bases which should be kept in mind in determining the ultimate and controlling fact of existence or non-existence of confiscation. After discussing these four matters we can examine and apply the facts in each particular case. Of these four contentions, two are, perhaps, of less practical importance. They are the war tax and the excess commissions to agents in St. Louis.

War Tax

This matter involves the propriety of eliminating the federal tax from expenses of the companies. During the particular five-year test period (1917-21, inclusive) involved in the investigation of the Superintendent under Section 6283, the companies were subject to and paid a federal war tax. This expenditure properly appeared as an expense during that period. That tax was repealed by the Act of November 23, 1921 (42 Stat. 227, 321). Under the reduced rate, there would, of course, be no such tax and no such expense. Therefore, the Superintendent was authorized, under Section 6283, and we are authorized, by recognized rules of law in rate cases (McCardle v. Indianapolis Co., 272 U. S. 400, 408-9; S. W. Tel. Co. v. Pub. Serv. Comm., 262 U. S. 276, 288; Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 691), to eliminate that as an item of expense in considering the effect of the reduction order upon these complainants.

Excess Commissions

The excess commissions paid agents in St. Louis came into the controversy in this wise. In determining what the aggregate profit of the companies was, the Superintendent deducted from their expenses certain excess in commissions paid by them to their agents in St. Louis. It is con-

ceded that agent commissions in St. Louis ran about 5% in excess of commissions paid in other places in the state. It is claimed by the companies that they were forced to pay this excess by business conditions in St. Louis. Those conditions were that brokers controlled the placing of a large portion of the insurance written and they charge the insurance agents a commission for placing the business with them. In a rate investigation, items of expense may be examined to ascertain whether they are in part or as a whole proper. On one hand, a company must have a wide discretion in the management of its own business, but, on the other hand, it cannot make expenditures which are clearly unnecessary and pass such into a rate charge. Its business must be "well and economically organized and carried on" (Aetna Ins. Co. v. Hyde, 275 U. S. 440, 448). From the meager showing in this record, we cannot say that this expense is so unreasonable that it should be eliminated. The real vice is that this excess is spread over upon other business in the state which did not cause it while the burden is, thereby, lightened on the very business which has caused it. We see no reason why the Superintendent could not, under the statute, have made a difference in the rates as applied to St. Louis which would have placed this burden where it belonged. This was not done. In considering the expenses of each of these complainants, we think these excess commissions should not be deducted from the expenses of such of these complainants as paid them. Whether fuller evidence upon this item might justify its exclusion is a matter we cannot determine now.

Rate Basis

Two contentions remain to be considered. One is that profit should be determined by consideration of the "earned" premiums and the incurred losses and expenses instead of paid premiums and paid losses and expenses. [fol. 131] The other is whether interest upon "unearned" premiums should be included as income. In a practical sense, these are the most important contentions in these cases—as stated in complainants' brief, it is "the basis upon which its bill rests" and, as stated in the opinion of the Supreme Court in the statutory review proceedings of

this order, "the controversy concerns the basis on which the findings were to be made" (275 U. S. 440, 446).

The object is to ascertain the "profit"—this naturally represents the difference between income and expenditures. The parties differ as to what is the basis for computing income and, also, as to the basis for computing expenditures.

The difference as to income is whether the basis should be premiums "paid" or premiums "earned." Premiums "paid" means such as are actually paid by the insured to the insurer during a given test period. Premiums "earned" requires more extended definition. Therefore, before entering upon a determination as to these contending bases as to "income," it is advisable to state a definition of the terms "earned" and "unearned" premiums and the place and use thereof in the fire insurance business. The fire insurance business is not one of dealing in commodities or things, but of furnishing a service. That service is indemnity from loss by fire. Such service is based upon contracts whereby the insurer assumes the obligation to indemnify. The consideration for this obligation is a payment by the insured therefor. This payment is called a premium.

As soon as a premium is paid and the indemnity is in force, the premium becomes the absolute property of the insurer. It is the price and compensation paid for the indemnity obligation assumed by the insurer. It has been finally earned in every sense of that word by the binding contract obligation to indemnify. Therefore, the terms "unearned" and "earned" premiums are inaccurate unless the sense in which they are used is understood. Those terms are used in two connections: cancellation of policies and the protective reserve. Policies usually provide for payments by the insurer to the insured upon the happening only of either of two contingencies: loss within the policy and cancellation of the policy. The former is the indemnity contracted for; the latter is the amount to be paid if the policy be cancelled by either party while it is in force. Neither loss under the policy nor cancellation is a certain matter. Each is entirely contingent. Either or both may never occur and, in fact, it is because such occurrence is the exception that the insurance business is a possibility.

As to cancellation of policies. From the lack of stress placed by counsel upon any effect on an insurer through cancellation of policies, it is fair to assume that it is negligible. However, because we are dealing with terms which need definition and because those terms are used in connection with the cancellation of policies it is well to ascertain their use and meaning in that respect. Policies provide for cancellation by either party during the life of the policy. The premium is paid for indemnity during the full term of the policy. As cancellation terminates the indemnity liability of the insurer before the full term for which the insured has paid, policies provide for repayment of that proportion of the premium which paid for the term remaining after cancellation. As one of the bases of the amount of premium paid is time (the rate relatively decreasing as the term of insurance increases), determination of the amount to be repaid, upon cancellation, depends partly upon which party declares cancellation. To prevent the insured securing short term protection at lower long term rates, if he cancels he is paid the difference between the premium paid and the short time rate for the time he was protected. To prevent the insurer forcing short time rates on an insured who has contracted for long term rates, if the insurer can- [fol. 132] cels, the payment is the long term rate on the term remaining after cancellation. To designate these amounts which must be paid the insured, upon cancellation, they are called "unearned" premiums, while the premium for the term before cancellation is called "earned" premium. Such payment to the insured is not a return, in specie, of any part of the premium paid and the contract for cancellation does not establish any trust or similar relation regarding the premium. It is merely a contract obligation wherein the amount to be paid the insured has relation to and is, in part, measured by the amount of premium paid for the policy.

As to the reserve. This has to do with losses under the policies. Although such losses are the exception, they occur. They may happen at any time upon any of such contracts and should, under the contract, be promptly paid. The insurer must be always in a financial position to make such payment. Good business intelligence and integrity

would require the maintenance of a liquid fund proportioned to the existing risks. When an insurance business starts, this fund is provided by the capital stock. State statutes usually require a minimum capitalization. As the business grows and the total of assumed risks increases, the fund must be correspondingly increased. Well managed companies carry such "surplus" as seems advisable for such purpose. Naturally, the management of companies would differ as to how much of its income (including premiums) should be thus reserved and how much paid out in dividends. To assure a sufficient reservation for the protection of the policyholder, the states have enacted laws. The basic thought in most of such laws is to secure this protection through reinsurance in some other and solvent company. This is worked out by requiring a fund sufficient for that purpose. As premium rates are the same in all companies—by law or by business necessity—the premiums for the unexpired terms of the policies are sufficient for the above purpose. Hence, the usual requirement is that the fund at all times equal the premiums on the unexpired terms of the policies in force. To describe this amount, it is called the "unearned" premium. The balance of the premium si called "earned" premium. This term "unearned" premium does not mean that the entire premiums have not been earned in the sense that they are absolutely the property of the insurer. It does not mean that the insurer must take nine out of every particular ten dollars paid as a premium on each policy and set that specific nine dollars aside. It does not mean that any trust or agency or other legal relation exists as to any part of any specific premium. What it does mean is that the insurer shall have and keep a fund of that amount constantly available for that purpose and that purpose alone. In short, it cannot distribute that much of its assets in dividends nor use it for other corporate purposes. In order to be sure that this fund is secure, different requirements are made. Some states require this segregation to be by physical deposit of approved securities in designated depositories. Ordinarily, it is merely a matter of bookkeeping by the insurer, enforced by examination of its books and securities by representatives of the state.

Having in mind the above meaning of the terms "earned" and "unearned" premium, we return to the contention between the parties. Plaintiffs contend that income should be based upon the "earned" premiums alone and that no account should be taken of the "unearned" premiums; defendants contend for paid premiums, which would include both "earned" and "unearned" premiums, together with interest received by the companies from investments representing the "unearned" premium. Comparison of these two contentions reveals two real points of difference. The first of these is whether "unearned" premiums shall be included in income. The second is whether interest upon invested "unearned" premiums should be included.

[fol. 133] While by no means unimportant, it is well to get the matter as to interest out of the way before reaching the main issue—inclusion of "unearned" income. The interest on "unearned" premiums should not be included as underwriting income.

The principal business of an insurance company is in assuming risks in return for pay. To assure prompt performance of its contracts it must build up and keep on hand funds necessary for that purpose. One source of profit is the investment of that fund to produce an income. That fund must be fairly liquid, so the result is that such investment usually takes the form of readily marketable interest bearing securities. This interest is the above profit. Thus, an important branch of such business is the investment of its funds. While the various states require a minimum fund (amount to reinsure) yet prudent management dictates a yet larger amount. Thus, the best companies have built up and maintain a "surplus" which represents funds not legally required as a reserve and which might be used for any corporate purpose, including dividends. For the most part, this surplus is the result of receipts from premiums. All parties here concede that such surplus and the income therefrom is not to be considered in estimating income for rate making purposes under the Missouri statute. Yet the defendants contend that the interest from the "unearned" premiums should be so included. Such interest is alone the result of investment by the company and is not the result of state requirement. That in-

vestment is not different in character and purpose from that of the "earned" premiums or of any other assets of the company.

As soon as a premium is paid, it becomes the absolute property of the company and subject to investment by it. Premiums are coming in daily. They are mingled with other funds from other sources and invested together and alike. The fact that money comes from "earned" or "unearned" premiums or other sources has and should have nothing to do with its investment. All income property of the company, except the contributions from its stockholders, is directly or indirectly traceable to premiums. To say that earnings on some recently paid portion of premiums are so-called underwriting profit while earnings on more remote portions are investment profits is a purely artificial distinction. To base this upon "unearned" premiums is no more real because "unearned" premiums is merely the name for the measure of the fund which is required to be kept to secure the indemnity contracts—there is no logical nor practical connection between the two thoughts. Therefore, because the premium when paid is the property of the company; because the interest arises from investment of such property; because there is no basis for such result in the fact that a reserve must be maintained (measured by the premium required to reinsure), and because it is conceded that the income from the investment part of the business should not be considered in a rate making base under this statute we think there is no ground for holding that interest from "unearned" premiums should be included as "income" for rate making purposes in these cases. Whether it could be included without violating constitutional guarantees is not in these cases and not considered herein.

The next matter is whether "unearned" premiums should be excluded as income. Plaintiffs urge this should be done because, they say, such premiums are not theirs to do with as they wish and may never be theirs. As soon as a premium is paid it is the property of the company. The company invests it precisely as it does any other monies it may have. The insured has parted with it completely. He has no kind of legal or equitable interest therein. All that he

has is the contract obligations of the policy. It is true that business prudence and State regulation require the maintenance of a fund to secure the performance of such outstanding contracts and that this fund cannot be used for other corporate purposes nor distributed as dividends. It is true [fol. 134] that, should the company become insolvent, this fund (in so far as State required) would be used for reinsurance and lost to the company. But the very nature of the business necessitates such a fund and such possible use thereof. And, all the while, this necessary fund is producing for the company the same income as from its other investments. The fact that the reserve fund cannot be used for corporate purposes nor distributed in dividends is not at all conclusive. From the nature of the business it would not be so used or distributed and no prudent and honest corporate management would ever think of such use or distribution. Therefore, that argument is purely theoretical and has no practical value.

Another consideration is as follows: It is obvious that the object of an insurance company is to make money out of premiums. It is organized and exists for that purpose. Clearly, the greater the volume of business, the greater should be the profit. In fact, most companies must operate at a positive loss until profit from the volume of business overcomes expenses. The greater and faster the business volume increases, the more expense required to produce it and the greater relative amount of "unearned" premiums necessary to protect that volume. If "unearned" premiums are to be excluded from calculation of income and profits, there is the anomalous result of an increasingly prosperous business in fact and an increasingly unprosperous business in theory. Take an illustration of a single piece of business. The day after a policy is paid for and in force, the amount required to reinsure it would be practically the entire premium paid, since only one day of the insured period has run, and this required amount would be "unearned" premium. It required expense to produce that policy—agent's commission, etc. If "unearned" premium is to be excluded, the company has had a heavy loss on that policy at that time. Yet the company makes its money by getting such policies and going through such experiences as to policies and premiums.

This seems to us to be an unsound theory based upon conditions which do not exist in fact.

On the contrary, premium "paid" represents money actually coming in from the business of underwriting and actually becoming the property of the company and subject to its investment and resulting profit therefrom. We think premium "paid," without interest on "unearned" premiums, is the proper and actual basis for income in rate making under this statute. This disposes of that part of the controversy over the rate bases, which related to income.

There is, as said above, a controversy, also, as to the basis for expenses and losses which shall be used. Defendants contend that losses and expenses "paid" during the test period should be used. The word "paid" requires no definition. Plaintiffs contend that losses and expenses "incurred" during the test period should be used. By losses "incurred" they mean "those which happened during the periods and for which liability became firmly fixed during the period" (Brief, p. 14). The difficulty with this latter method is not in its theory but in its practical application. If by "liability became firmly fixed during the period" is meant merely where the loss occurs during the period, then it would, in practical application, require some estimate of losses not fully adjusted or accepted within such period although such are frequently subject to wide ranges between amounts claimed by insured and those conceded by the insurer and sometimes the liability is denied entirely and often the difference hinges on complicated facts requiring extended presentation and much evidence. This would afford opportunity for important differences as to how such amounts should be determined and by whom determined and require extended investigation to be more than a wild guess and, at very best, would be merely and solely an [fol. 135] "estimate" or matter of opinion. However, the expression quoted evidently means something more than the mere occurrence of the loss under the policy within the period. It means that the amount of loss has been "firmly fixed," by judgment in a court within the period or by action of the parties within the period. In practical application, this would entirely eliminate all losses occurring near the end of a period which were not "firmly fixed" within

the period; all losses so occurring near the end of the preceding period and all losses passing into litigation or extended negotiation reaching beyond the particular period of occurrence. This method would exclude all of the above classes from inclusion in any period. These classes are nit inconsiderable and, obviously, they should be included at some time because they are actually paid by the insurer.

While the losses "paid" method, urged by the defendants, will not accurately represent the losses occurring within a given period, because it will include payments for some losses occurring prior to the period and will exclude some losses occurring during the period but not "firmly fixed" within the same period, yet there is no reason to think that ordinary losses and actual payments thereon will not normally pretty fairly equalize from year to year, and, moreover, the payments will be actualities instead of guesses or estimates. This is even truer where the test period extends over a term of consecutive years as here (the statute requiring five years). The extraordinary losses (so-called "fire hazard") are taken care of in the rate by an addition thereto for that particular purpose. While neither method is perfect in application, the paid method seems more practical and entirely fair to the companies as it includes all losses—a thing which the other method could not do.

As to underwriting expenses and as to payments on account of policy cancellations, the amounts due are almost always subject to definite and immediate statement and might well be subject to either the "incurred" or the "paid" method. Because we doubt if there would be appreciable difference between these two methods, from year to year, and merely for uniformity, we think it would be better to have them follow the method adopted as to losses.

Summary

Our conclusion as to proper basis for rate purposes is that it should be based upon underwriting income and upon losses, cancellation payments and underwriting expenses; that such income should consist of paid premiums alone without interest from any source; that losses, cancellation payments and underwriting expenses should be taken upon the paid method; that, in these cases, it is proper to con-

sider the effect upon expenses (in determining confiscation) of the repealed war tax and, under the evidence now here, it is not proper to consider the so-called excess agency commissions in St. Louis.

The Evidence

Having attempted to examine and determine all of the contentions which are generally applicable to all of these cases, consideration next is to be given to the particular evidence in each case to determine whether that evidence establishes confiscation as to the particular plaintiff. Examination of the petitions reveals that they are all drawn upon the theory, common with the plaintiffs, that the basis for determining confiscation is the exclusion of "unearned" premiums from income and the treatment of losses and expenses on the "incurred" theory. All of the evidence of facts relating to or bearing upon confiscation is of that char- [fol. 136] acter whether in the verified petitions, in affidavits or orally given. We think that basis is unsound. Evidence purely of that character is no guide nor help in determining confiscation in the way which seems to us proper. In short, there is no evidence from which confiscation could be found in any of the cases. The burden of proving confiscation has not been met. Ordinarily, the result from such failure would be denial of temporary injunctive relief. However, there are other considerations bearing upon the matter. The failure of proof here arises from a mistake as to the basis of or line of evidence and not from inability to produce proof along proper lines. The defendants have offered no evidence of facts to refute the claim of confiscation. This is not stated as a criticism, for counsel might rely upon the weakness of plaintiffs' evidence to sustain the burden of proof. It is stated to make clear that neither party has introduced and this court has before it in these hearings no evidence which properly bears upon confiscation in any of these cases. Yet the court knows that there is much, very much, evidence upon this crucial matter. With the bases for such inquiry determined, the parties will produce this evidence—for and against confiscation. It is impossible to anticipate that proof.

The issues in these cases are grave and are seriously urged and of far-reaching consequence. If the injunctions

be denied until final decree, there might result substantial and irreparable loss to each of these plaintiffs because the recovery of ten percentum of each premium from each policyholder upon each policy is impractical, if not impossible. The expense thereof is prohibitive when the amount of each recovery is considered. On the other hand, the premium payers can be protected at the same time that the companies are. This can be done by granting the applications for temporary injunction properly conditioned as to bond or deposit in court. This is the method and procedure applicable and approved by the Supreme Court (Ohio Oil Co. v. E. A. Conway, Supervisor, decided March 5, 1929).

Conclusion

Allowance of the applications for temporary injunctions (upon conditions protective to premium payers) of all plaintiffs which were not parties to the stipulation.

Denial of applications, without prejudice of renewal upon a showing of repayment under the stipulation, of all plaintiffs which were parties to the stipulation.

Addendum to Opinion

At conclusion of reading of the opinion in the above cases, counsel called to the attention of the court the matter of the effective date of the order of the Superintendent. The court is indebted to counsel for the suggestion. The members of the court have not overlooked this point in the briefs. However, in reaching the determination that the plaintiffs (parties to the stipulation) should not now be heard and that the plaintiffs (not parties to the stipulation) should be granted injunctions in order to maintain the status quo until the merits could be determined, there was no necessity to dispose of that question and the court purposely omitted to do so.

Later, when the court came to work out the mode of making its determinations effective, that matter was lost sight of inadvertently except that an effective date was placed in the tentative suggestiins as to form of order relating to the parties not signing the stipulation.

[fol. 137] The suggestion of counsel is well made. It is necessary to state our views upon this matter in order to

enable the parties (signing the stipulation) to know the amount of refund necessary and the parties (not so signing) to know the amount of bond necessary.

According to the order, it became effective on November 15, 1922. The statute (Sec. 6283) gives the companies thirty days after a reduction order is made within which time they may apply the reduction to particular classes of insurance to be approved by the Superintendent, and, failing so to do, the Superintendent shall make such application. It is thus clear that an order of reduction is not fully in force until such designation is made in one of the above ways. Here no such designation has ever been suggested by the companies and the Superintendent did not make such until February 1, 1928, when he made the rate applicable to all classes. The contention made by plaintiffs is that the order was not in force until the designation on February 1, 1928. The stipulation expressly provided that any such order should apply to all classes. The stipulation amounted to a designation in advance in so far as the parties thereto were concerned. The companies, which were parties to the stipulation, as well as the Superintendent, treated the rates as in effect, under the stipulation, without any such designation. No review could be had under Section 6283 until the order was binding. The parties pursued the remedy given by that section. Unless and until the order became effective there was no need for the stipulated bond. Yet, it was given when the review proceedings (under Section 6284) were initiated in the sum of $500,000 and, as stated in the petitions herein, "the terms of said bond to said defendant Hyde, for the use and benefit of all persons, firms and corporations to whom policies of fire, lightning, hail and windstorm insurance, covering property in the State of Missouri, may be issued * * * on and after November 10, 1922, and prior to the entry of a final decree in said cause." Also, as these collections increased, additional bond was given by such plaintiffs in a like amount, prior to February 1, 1928. The only explanation of such conduct is that all parties understood the stipulation to settle the matter of designation of classes. Such plaintiffs cannot now take a directly opposite position. They are estopped to deny that the order was not

in effect as to them from the effective date (November 15, 1922) provided in the order itself.

The plaintiffs here which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute. As to them the order did not become effective until February 1, 1928.

[fol. 138] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 139 & 140] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 31, 1929

Comes now appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Robert J. Folonie, William S. Hogsett, John S. Leahy, Ashley Cockrill, Solicitors for Appellant.

Service of the foregoing statement of points relied upon and designation of parts of the record to be printed is acknowledged this 28th day of May, A. D. 1929.

J. T. Barker, Floyd E. Jacobs, Solicitors for Appellees.

[fol. 141] [File endorsement omitted.]

Endorsed on cover: File No. 34,230. W. Missouri D. C. U. S. Term No. 104. National Fire Insurance Company of Hartford, appellant, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri. Filed May 22nd, 1929. File No. 34,230.